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82-876

CASE NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,
Petitioner,

v.

CRAIG FOWLER,
CHARLES JORDAN,
LARRY JOHNSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER A STATE TRIAL COURT HOLDING THAT "I FIND THE STATEMENTS WERE VOLUNTARILY GIVEN AND WERE NOT GIVEN BECAUSE OF THREATS, COERCION, AND ABUSE" IS SUFFICIENTLY PARTICULAR TO BE ACCORDED THE PRESUMPTION OF CORRECTNESS MANDATED BY PRINCIPLES OF FEDERAL–STATE COMITY AS CODIFIED IN 28 U.S.C. SECTION 2254(d) WHERE SUCH HOLDING WAS MADE AFTER A FULL AND FAIR EVIDENTIARY HEARING IN WHICH CONSIDERABLY DISPUTED TESTIMONY COULD ONLY BE RESOLVED ON THE BASIS OF A CREDIBILITY DETERMINATION; UNDER SUCH CIRCUMSTANCES MAY A FEDERAL APPEALS COURT REQUIRE A NEW FEDERAL EVIDENTIARY HEARING, EIGHT YEARS AFTER THE FACT, WHERE SUCH EVIDENTIARY HEARING WAS NOT ONLY NOT REQUESTED IN THE DISTRICT COURT BUT STIPULATED AS BEING UNNECESSARY.

PARTIES

The parties to this action are R. C. Marshall, Superintendent of the Southern Ohio Correctional Facility as successor custodian to A. R. Jago, the former Superintendent of that institution, and the respondents, Craig Fowler, Charles Jordan, and Larry Johnson.

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OPINIONS BELOW

The decision of the United States Court of Appeals For The Sixth Circuit is reported as *Fowler, et al. v. Jago,* 683 F. 2d 983 (6th Cir. 1982). (A-1). The decision of the United States District Court For The Northern District Of Ohio, Eastern Divison is not reported. (A-32).

JURISDICTION

The decision of the United States Court Of Appeals For The Sixth Circuit was entered July 20, 1982. (A-1). A timely petition for rehearing and suggestion of rehearing en banc was denied October 7, 1982 (A-60). The decision of the United States District Court For The Northern District Of Ohio, Eastern Division was entered June 16, 1980 (A-32). Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2254(d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit:

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding,

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph

numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondents, hereinafter, Fowler, Jordan, and Johnson, along with a fourth individual, Asa J. Harris, were charged by the April 1974 Term of the Cuyahoga County, Ohio Grand Jury with 33 separate offenses arising from a spree of incidents occurring on May 29, 1974. At trial, the state established that on the evening of May 29, 1974, Andrew "Schoolboy" Jackson was watching television at Judy Winegardner's house at 13615 Fourth Street, East Cleveland, Ohio. Present in the house were several minor children. Judy Winegardner and Andrew Jackson, Jr. (12) had left the house to go to the store.

At about 9:30 p.m., several men broke into the house and at gunpoint forced all the people in the house to lie face down on the floor.[1] The instruders then proceeded to rob Andrew Jackson of his rings and money and took televisions, a stereo record player and speakers and other items from the house, which were loaded in two cars — one belonging to Andrew Jackson and the other to Fowler.

While the burglary was occurring, Judy Wingardner and Andrew Jackson, Jr. returned from the store. They

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1. Several victims identified a man named Boshoen as one of the men. Boshoen was later identified as Asa J. Harris. Harris' defense at trial was alibi. Only Fowler, Jordan and Johnson were arrested that night, Harris later being arrested in Cincinnati, Ohio.

were then forced into the house with the other people and Judy Winegardner was robbed of two diamond rings. The intruders then tied up all the victims except a 16-month old baby and Andrew Jackson who was forced to accompany them.

The gunmen took Jackson to his house at 13736 Euclid Avenue, East Cleveland, Ohio. In the house were several other individuals. The gunmen forced their way into the house, kicking in the back door. They then forced the victims to lay on the floor and burglarized the house of money, jewelry, guns, a T.V. set, and other items belonging to Andrew Jackson. During this time, Joyce Cray, who lived on the third floor of the house, telephoned police who responded to the area. Being notified of police presence, the gunmen started to leave, again taking Jackson with them. Jackson was able to break free however and ran to the police, the men fleeing through the backyards of various houses on blocks bordered by Wellesley and Mt. Union. Police on the scene went into Jackson's house, untied the people there, observed that the telephones had been ripped out and found a carbine rifle on the kitchen table.

Police then began an extensive search of the Wellesley–Mt. Union area, eventually coming to the O'Brien house. At that time, the gunmen who had broken in, ordered Michael O'Brien to tell the police that the men they were looking for had been there but left. At that time, various members of the O'Brien family were on the second and third floors of the house. One of the gunmen was on a landing between the first and second floor, watching the front door. The other gunmen were on the second floor.

The police noticed that Michael O'Brien was extremely nervous and asked if they could search the

house. Just as a couple of the officers entered the vestibule of the house, Michael O'Brien informed the police the men were inside. The police officers turned to run off the porch and simultaneously a rapid burst of rifle fire came from the house at the police on the porch. As the police were diving for cover, a Cleveland police car containing Officers Spahr and Beranek drove up to the front of the O'Brien house. At that time, bursts of rifle fire hit them, wounding both.

A gun battle lasting for about an hour then ensued, Cleveland police reinforcing the units from East Cleveland. During such battle, various other officers received wounds. After various doses of tear gas, the gunmen eventually left the house, allowing most of the O'Briens to leave by the front door and taking some of them with them out the back. During the confusion of the subsequent arrests, two of the O'Briens were shot and wounded. Following arrest, Fowler, Jordan and Johnson each made admissions that they broke into the O'Brien house and had earlier broken into Jackson's house to rob him.

Fowler, Jordan and Johnson related an entirely different sequence of events than that shown by the state's witnesses and their own admissions. They testified that "Schoolboy" Jackson was a known drug pusher who they were attempting to convert to their Sunni Muslim faith, and thus stop drug traffic in the East Cleveland area. After several prior confrontations, Jackson, on May 29, 1974, indicated that he had been thinking about what they had told him and wanted them to come to his house for further discussions. Contrary to the testimony of the state's witnesses who were tied up when found by police, Fowler, Jordan and Johnson stated that when they arrived, Jackson was alone. A discussion followed in which Jackson appeared to be agreeing to their religion and he voluntarily flushed some drugs down the toilet.

Jackson then said he had some guns that he wanted to get rid of to purge himself and they all proceeded to his house where, after 15 or 20 minutes upstairs by himself, Jackson gave them the guns. As they were preparing to leave, Jackson pushed Fowler and started running towards police who began firing. Fowler, Jordan and Johnson alleged at trial that this was a set-up by Jackson with the aid of police who he allegedly was paying off to conduct his narcotics business.

Fearing for their lives, Fowler, Jordan and Johnson fled, arriving at the O'Brien house where they sought refuge. Thereafter, as the police entered the home, the police fired, and they returned it to protect themselves, as they believed the police were trying to kill them. At trial, Fowler, Jordan and Johnson attacked the voluntariness of their admissions and the accuracy of such admissions as relayed or recorded by the police. They also theorized that various of the officers had been shot by other police in a cross-fire.

After careful consideration of all the evidence produced in this month-long trial, the jury returned its verdict finding Fowler, Jordan, and Johnson each guilty of the aggravated burglary of Andrew Jackson, the aggravated robbery of Andrew Jackson, the aggravated burglary of Judy Winegardner, the aggravated burglary of Catherine O'Brien, and the attempted aggravated murders of Ptl. William Beranek and Sgt. Richard Spahr. Various counts resulted in verdicts of not guilty and on various counts the jury failed to return a verdict and the trial court dismissed such charges. Asa J. Harris was acquitted on all charges.

As a result of the above convictions, Fowler, Jordan, and Johnson were each sentenced to terms in the Ohio penal system totalling 15-100 years.[2] Subsequent to

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2. Johnson's total sentence is 17-140 years, the sentence in issue herein being consecutive to two prior convictions for which he was on parole.

conviction, Fowler, Jordan and Johnson each appealed to the Court of Appeals of Cuyahoga County, Ohio raising numerous allegations of error including the voluntariness of his statements. On December 11, 1975, however, the Court of Appeals affirmed in all respects. (A-62). A subsequent appeal to the Ohio Supreme Court raising the identical issues was denied on May 13, 1976. (A-71).

On January 12, 1979, Fowler, Jordan, and Johnson, each filed a petition for writ of habeas corpus relief with the United States District Court For The Northern District Of Ohio, Eastern Division and the petitions were consolidated. As pertinent, the petitions alleged:

> The state trial court violated petitioner's fifth and fourteenth amendment rights by admitting into evidence statements purportedly made by petitioner while in police custody, which were extracted by deception and physical and mental coercion.

(Not reproduced in appendix). A return of writ admitting exhaustion of state remedies, but contesting the merits of each of the several claims was duly filed and the lengthy transcript of the state court trial was submitted as an exhibit.[3]

Following interim pleadings, the district court, on June 16, 1980, issued its opinion and judgment denying the writ of habeas corpus. (A-32). With respect to the voluntariness of Fowler, Jordan, and Johnson's statements, the district court held:

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3. Due to the length of the transcript, 8000 pages, it was not required to be physically filed with the district court, but was kept by the Clerk of Court of Cuyahoga County for safekeeping and subsequent loan basis to the district court. The transcript however is part of the record of this case.

> Whether petitioners in this case were subjected to verbal and physical abuse and whether their confessions were the product of any such abuse, are factual issues that were fully and fairly litigated in the trial court at a hearing in which petitioners were represented by counsel. Therefore under 28 U.S.C. Section 2254(d), the finding of the state court that petitioners' confessions were not the product of abuse or coercion is presumed to be correct unless that "factual determination is not supported by the record".
>
> As stated above, there was conflicting testimony about whether petitioners were subjected to physical and verbal abuse. Resolution of this issue was largely a matter of credibility. After hearing the testimony of the witnesses and looking at photographs taken of the petitioners on the night of their arrest, the court found that petitioners' confessions were not coerced. This Court, having considered as a whole that part of the record pertinent to the issue of coercion, finds the state court's determination is fairly supported by the record.

(A-38).[4] A motion to alter and amend judgment was denied on July 10, 1980. (A-59).

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4. Of significant importance is that Fowler, Jordan, and Johnson not only did not request an evidentiary hearing, but stipulated that none was necessary:

> The Petitioners and Respondent are in agreement that no evidentiary hearing is necessary in this case to review the claims currently presented to the Court.

(A-74).

Upon appeal, the United States Court Of Appeals For The Sixth Circuit, by 2-1 vote, reversed and remanded for a new evidentiary hearing. (A-1). In essence, the majority held that the state trial judge did not make a sufficiently particularized holding entitled to a presumption of correctness since it could not determine whether the state trial court utilized the correct application of constitutional law nor found the facts reliably:

> This Court cannot evaluate the appropriateness of the state court's conclusion because the state trial judge has given no indication that he applied the appropriate legal standard. The factual disputes in this case are so frequent and so dramatic that they call for specific credibility resolution by a judge.

(A-15). Judge Engel wrote a lengthy dissent, the substance of which is capsulized:

> In my opinion, a proper respect for the teachings of *LaVallee v. Delle Rose,* 410 U.S. 690 (1973), and *Townsend v. Sain,* and for the Congressional mandate of 28 U.S.C. Section 2254 justifiably require us to uphold the decision of the district court denying habeas relief.

(A-21). A petition for rehearing and suggestion of rehearing en banc was denied on October 7, 1982 (A-60) and a stay of the mandate was issued October 26, 1982. (A-61). This petition has followed.

ARGUMENT IN SUPPORT OF CERTIORARI

I

WHETHER A STATE TRIAL COURT HOLDING THAT "I FIND THE STATEMENTS WERE VOLUNTARILY GIVEN AND WERE NOT GIVEN BECAUSE OF THREATS, COERCION, AND ABUSE" IS SUFFICIENTLY PARTICULAR TO BE ACCORDED THE PRESUMPTION OF CORRECTNESS MANDATED BY PRINCIPLES OF FEDERAL–STATE COMITY AS CODIFIED IN 28 U.S.C. SECTION 2254(d) WHERE SUCH HOLDING WAS MADE AFTER A FULL AND FAIR EVIDENTIARY HEARING IN WHICH CONSIDERABLY DISPUTED TESTIMONY COULD ONLY BE RESOLVED ON THE BASIS OF A CREDIBILITY DETERMINATION; UNDER SUCH CIRCUMSTANCES MAY A FEDERAL APPEALS COURT REQUIRE A NEW FEDERAL EVIDENTIARY HEARING, EIGHT YEARS AFTER THE FACT, WHERE SUCH EVIDENTIARY HEARING WAS NOT ONLY NOT REQUESTED IN THE DISTRICT COURT BUT STIPULATED AS BEING UNNECESSARY.

Petitioner is well aware of recent pronouncements of this Court that the writ of certiorari is not a vehicle for the correction of every erroneous decision issued by a lower court and must be utilized carefully in the interests of docket control. *Harless v. Anderson,* _____U.S._____ (1982). Given those parameters however, this case remains a proper case for certiorari review. This is not simply another case in which a disaffected litigant seeks

one more chance. Rather it is a case in which the decision of the Court below is in direct conflict with applicable decisions by this Court. *Sumner v. Mata,* (I), 449 U.S. 539 (1981); *LaVallee v. Delle Rose,* 410 U.S. 690 (1973). Certiorari serves an important goal in such situation by securing uniformity of decision by the lower courts. It serves the interest of docket control by limiting and confining the lower courts to the proper exercise of their jurisdiction.

Moreover, the case is one of national importance as a representative example of the unfortunate tendency in recent years of the lower courts not honoring the direction and precedent by this Court as to the proper relationships of the federal and state judiciary. In *Sumner v. Mata,* (I) *supra,* this Court clearly set forth the policy considerations of comity, minimization of friction, and finality justifying a presumption of correctness of state court factual findings which is essential to a properly working federal system. Judge Engel in dissent in this case summarized such holding:

> Congress carefully provided in 28 U.S.C. Section 2254(d) for a presumption of correctness of factual findings made after a hearing by a state court of competent jurisdiction. Section 2254(d) commands that these factual findings "shall" be presumed correct unless any one of eight specific circumstances should exist. Clearly, the statute admonishes federal courts to be respectful of the integrity of their sister courts in the states and of the coequal ability of state courts to protect the constitutional rights of persons accused of crime.

(A-22). Despite such pronouncement, this Court has been called upon to secure compliance with its own decision. *Sumner v. Mata,* (II), _____U.S._____, 71 L. Ed. 2d 480 (1982); *Lonberger v. Jago,* 635 F. 2d 1189 (6th Cir. 1980), *vacated and remanded,* _____U.S._____, 68 L. Ed. 2d 290 (1981), *opinion after remand,* 651 F. 2d 447 (6th Cir. 1981), *cert. granted sub nom Marshall v. Lonberger,* _____U.S._____, 71 L. Ed. 2d 292 (1982).[5] This case again calls on this Court to enforce the supremacy of its own decisions. The principles of comity, minimization of friction, and finality have all been violated by the appellate court's first instance undermining of eight year old convictions rendered after a month long trial by a jury of respondents' peers.

Finally, unlike other *Sumner* cases before this Court, this case involves a novel, unanswered and important twist to the problem of when a state court finding should be accorded the presumption of correctness – the interplay between *LaVallee v. Delle Rose, surpa* and *Sumner, surpa.* The Court of Appeals herein did not directly confront the state court finding of fact and hold that it was not supported by the evidence. 28 U.S.C. Section 2254(d)(8). Rather, relying on 28 U.S.C. Section 2254(d)(1), the appellate court created an end run around *Sumner* and simply held that the state court finding was not a finding subject to the *Sumner* presumption.

> The state judge's findings in the instant case cannot meet these exacting standards. The findings are conclusory and do not give assurance that the trier of fact applied the correct standards of law.

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5. See also: *Clark v. Jago,* 676 F. 2d 1099 (6th Cir. 1982), *cert. pending.*

(A-14). In the context of this case, such a holding portends that few, if any, state court findings will survive scrutiny. This Court's decisions in *Sumner* and *LaVallee* portend just the opposite.

The trial court in this case held a 4½ day evidentiary hearing on the admissibility of Fowler's oral and written statement, Jordan's oral statement and Johnson's oral and written statement. Each respondent was represented by competent counsel and numerous witnesses were called. At the conclusion of the hearing, the trial court held that all statements, except Fowler's written statement which was suppressed, would be admitted into evidence. With respect to specific allegations of physical and mental coercion, the trial court ruled:

> I find the statements were voluntarily given and were not given because of threats, coercion, and abuse.

(Tr. 662) (A-76). The appellate court now holds that the trial court did not adequately resolve the merits of respondents' factual assertions. Such holding constitutes mere substitution of judgment.

The appellate court went astray in its initial premise. The Court found the above holding not sufficiently particular to withstand scrutiny because semantically it concluded one could not ascertain whether the trial court found no coercion or abuse and thus the statements were voluntary or whether the trial court found coercion and abuse, but applied the wrong standard of law. (A-15). In answer to this contention, *LaVallee* is answer enough.

In *LaVallee,* this Court was faced with a similar situation. Therein, after an evidentiary hearing, the state court simply ruled, ". . . I find and decide that the

respective confessions to the police and district attorney were, in all respects, voluntary and legally admissible at the trial." *LaVallee, supra* at 691. In response to an argument that such finding was not sufficiently particular to be accorded the presumption, this Court relied on language in *Townsend v. Sain,* 372 U.S. 293 (1963)[6] to hold that when a trial judge refuses to exclude a confession in the face of allegations of "third degree" methods of interrogation, the district judge may assume that the state court reliably found the material facts. *LaVallee, supra* at 694. Such assumption should be applied to the more particularized finding in this case.

As indicated in the statement of facts, the evidence at the hearing on the motion to suppress was in considerable dispute and turned ultimately on the credibility of the witnesses. Fowler, Jordan, and Johnson each testified to a series of physical and mental coercions starting with their arrests and terminating with the giving of their statements. Fowler testified that he was placed on the ground, cuffed, kicked several times, choked, and burned with a cigarette on his leg. Then he was beaten with a black jack and ultimately placed in a room where officer Bayerl moved between he and Jordan hitting each in the face with the butt of his shotgun which eventually broke. In interrogation, racial epithets were used, he was threatened with physical harm, his family was threatened, and he was denied an attorney and medical care. Jordan similarly testified that he was made to lie spread eagled on the ground, that he was struck several times with a rifle, that he was continually denied an attorney, and was subjected to custodial interrogation which included denial of his rights and verbal and physical abuse. Finally,

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6. "Thus if third degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third degree methods necessarily produce a coerced confession." *Townsend, supra* at 315.

Johnson alleged that while on the ground after being arrested, he was beaten and his hand stepped on. He was then dragged to the police car wherein a woman police officer hit him in the face with a flashlight and another officer beat him with a black jack. Then as he was being taken into the police station his head was rammed into a steel door. At the police station, he was threatened with physical injury, denied counsel, and told if he didn't give a statement the Dectective squad would be turned loose on his family. Johnson alleged specifically that he was told if he didn't give a statement he would lose his eye, which was cut, and for which he ultimately got medical treatment.

The police officers' testimony was substantially different and included a complete denial of any mental or physical coercion. The officers testified that any injuries that occurred to respondents occurred as a result of resisting arrest. As an example, Fowler was knocked to the ground as he proceeded out of the O'Brien house with several of the hostages in front of him. Similarly, Johnson was pushed into the door of the police station as he was attempting to break away. Officer Bayerl specifically denied that he hit Fowler or Jordan with a shotgun, and similar denials were evoked with respect to Johnson being hit with a flashlight. The police officers denied any threats to respondents' families, and substantially disputed every facet of the interrogation process. The extent of the police denial as to physical or mental abuse is specifically catalogued in Judge Engel's dissent. (A-27). More importantly, with respect to request for counsel, testimony was elicited that each respondent had been given their rights, had not requested counsel, and gave accurate statements which were signed and initialed by them.[7] Finally, there was substantial

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7. Fowler did request a counsel in connection with giving a written statement and police attempted to call one for him. The trial court suppressed this written statement for that reason, but did not suppress his prior oral statement.

testimony by the police officers disputing not only how respondents suffered any injuries, but the extent of such injuries as well. Given the conflicting testimony, the following conclusion of Judge Engel is inherently correct:

> I believe that the state trial judge was fully entitled to discredit not only their testimony concerning the night's events altogether, but also was entitled to discount the petitioners' description of the causes and extent of their alleged injuries and any impact those events might have had on the voluntariness of their statements. Obviously that is exactly what he did.

(A-27).

Notwithstanding that the determination to be made turned solely on credibility, the appellate court concluded that the state trial judge may have utilized the wrong standard. Pursuant to *LaVallee,* however, the trial court's finding must be read in the common sense manner in which it was intended and not the strained semantic gloss placed on it by the appellate court. The state trial judge was experienced, fair and competent. Even the attorneys pressing the motion to suppress never doubted his ability to know and apply the correct constitutional standards:

> This being the evidence in the case, I won't burden the Court. The Court heard the evidence, and I am sure the Court is aware of the various case laws in the area.

(Tr. 626). (Not reproduced in appendix). Moreover, respondents never questioned that the trial court had

made a sufficiently particularized finding until the question was raised as an appellate afterthought. In the district court, respondents specifically indicated that no evidentiary hearing was necessary. (A-74). They never asserted that no finding was made, that the finding was not specific, or that the Court applied the wrong law. Rather they simply asserted, contrary to 28 U.S.C. Section 2254(d), that from the cold record the district court should make its own credibility determinations. It was only on appeal and after the district court had found the finding supported by the record, that they attacked the finding itself. This resulted in the anomolous result that the appellate court remanded for an evidentiary hearing that respondents had told the district court was unnecessary. (A-74). Finally, the construction by the appellate court gives no credence to the competency or integrity of the state trial judge (or the state reviewing courts). The law on coerced confessions is well settled. *Lego v. Twomey,* 404 U.S. 477 (1972); *Haynes v. Washington,* 373 U.S. 503 (1963); *Spano v. New York,* 360 U.S. 315 (1959). If the trial court had found the coercion and abuse alleged by respondents in this case, it "can scarcely be doubted" that relief would not have been granted:

> Under these circumstances, we think the District Court could have been reasonably certain that the state court would have granted relief if it had believed respondents' allegations.

LaVallee, supra at 695.[8]

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8. Indeed rulings by the state trial judge with respect to *Miranda* and counsel claims give further indication that respondents' voluntariness allegations were disbelieved and the trial judge was well aware of prevailing constitutional law. Immediately following the ruling on voluntariness, the trial judge denied the further allegations that the statements should be suppressed for failure to abide by *Miranda v. Arizona,* 384 U.S. 436 (1966). The trial court suppressed one statement holding:

In response to the assertion that *LaVallee* controlled this case, the appellate court found it distinguishable on the basis that the factual disputes herein were "too complex":

> The need for such a hearing is compelled by the failure of the state trial judge to articulate the legal standard applied in making the determination of voluntariness, or the factual findings upon which it was based in light of the complex facts of this case.

(A-15). But a requirement that the state trier of fact issue a "finding of fact and conclusion of law" as to each credibility determination is exactly the approach rejected by this Court in *LaVallee:*

> The only question is, whether a lawyer was requested prior to any statement.
>
> I find that Defendant Fowler asked to see a lawyer before making a written statement. This being the case, his written statement will be suppressed.
>
> I find Defendant Jordan waived his right to a lawyer, that he did not request a lawyer prior to making his statement and therefore, his statement is admissible.
>
> I find the oral statement of Defendant Johnson to be admissible, since he requested to see a lawyer only before making a written statement, and no such statement was ever made.
>
> Thus, for Defendant Fowler, the oral statement can be used. The written statement cannot be.
>
> For the Defendant Johnson, his written statement can be used, and for the Defendant Jordan, his oral statement can be used.

(Tr. 662-663) (A-76). As noted by the district court, the trial court transposed the first references to Jordan and Johnson. (A-40). The fact remains that the trial court could not have reached the above conclusions unless he disbelieved the testimony with respect to request for counsel.

> Although it is true that the state trial court did not specifically articulate its credibility findings, it can scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him.

LaVallee, supra at 692. The appellate court simply adopts the dissenting position in *LaVallee.* (A-9).

Moreover, petitioner disputes the contention of the appellate court that this case was "too complex" to be controlled by *LaVallee.* The only complexity to the credibility determinations is that unlike *LaVallee,* three individuals instead of one alleged physical and mental coercion. Even under the dissent's view in *LaVallee,* the relatively simple determination of whether to believe the allegations should be accorded the presumption:

> To be sure, where for instance, a defendant alleges simply that a confession was extracted from him by means of a physical beating administered by the police, it is obvious that if the defendant's story is believed, the confession would be involuntary. Thus even if a state court holds the defendant's confession to be voluntary *without articulating any reason,* a federal district court may safely assume that in such an uncomplicated situation, the state Court's determinations resulted from a rejection of the defendant's factual allegations.

(emphasis added) *LaVallee, supra* at 698-699, Marshall dissent. The trial court's holding herein is hardly "without articulating any reason".

Finally, the complexity of the case as perceived by the appellate court is of its own making. Petitioner highly disputes the appellate court's contention that there are unexplained inconsistencies in the record of this case which cast material doubt on whether the trial court adequately found the facts. Rather, the appellate court both mischaracterizes the record and fails to follow the clear substantive and procedural admonitons by this court in *Sumner* to explain why it does not credit the characterizations of primary historical fact by the state judiciary.

The most prominent example is the treatment the appellate court gives to respondents' contention that newspaper photos taken at the scene of the arrest when compared to police photographs taken later at the police station establish that some injury occurred in the interim. The appellate court's characterization is as follows:

> There is clear evidence from photographs that defendants Fowler and Johnson suffered injuries between approximately 1:00 a.m., at the time of their arrest, and 4:00 to 5:00 a.m., when photographs were made.

(A-4). Yet the state court of appeals reviewing the same record stated:

> The photographs of the appellants, do not demonstrate they had been beaten as the injuries were minor and insignificant.

(A-66). The appellate court never states why it does not credit this finding. While stating it had no view on the merits, the appellate court does state:

> A comparison of pictures taken of Fowler at the time of his arrest with identification photos at the station indicate that Fowler's face sustained some type of blow. These pictures and the testimony of Officer Copeland remain entirely unexplained.
>
> Or, did it conclude that no coercion was used against petitioners? If it reached the latter conclusion, the finding would be clearly erroneous, for there is clear evidence on the record indicating that force and coercion were used against petitioners, particularly with reference to Fowler.

(A-14, 15). Yet the appellate court never explains how it makes such statements in light of the testimony of police officers that Fowler was not abused, that any injuries sustained were the product of Fowler's own resistance and any injuries were far less than claimed by Fowler. The appellate court's whole compliance with *Sumner* is to state:

> We believe that the long reiteration of the questions raised by the testimony at the state court hearing fulfills this obligation.

(A-16). The final anomoly of this case is that the appellate court's lengthy opinion is far less clear as to why it rejected the state court finding than the trial court's relatively succint finding was in rejecting respondents' claims. From the majority opinion itself, there is evidence to support Judge Engle's comment:

> I respectfully suggest that what is characterized by the majority as uncertainty

> regarding the legal standard employed in the state court is simply an honest disagreement with the conclusions which the state trial judge so clearly reached respecting voluntariness. This is not and should not be, in our constitutional system of joint federal-state responsibility, a valid basis for the interposition of the differing views of federal judges.

(A-25).

One final example is necessary to establish the liberty that the appellate court took with the record in this case. The appellate court states that:

> He [Officer Copeland] admitted that the police probably hit the petitioner.

(A-6). From this, the appellate court constructs that there had to be coercion:

> For example, Officer Copeland conceded that Fowler had probably been struck. He also conceded that Fowler's face showed evidence of some trauma. . . .These pictures and *the testimony of Officer Copeland* remain entirely unexplained.

(A-14). (emphasis added) Yet the testimony of Officer Copeland is not supportive of this thesis. Officer Copeland testified:

> (Mr. Wuliger)
>
> Q. Now, other than observing sweating on Charles Jordan, you weren't able to discern any other physical infirmities that he was suffering from at that time?

(Officer Copeland)

A. Well, I will explain it to you at this time so that you will understand.

The male got arrested. If they got hit—Fowler—which may have been a cut on his lip—I don't know.

But I can't sit here and say that they weren't, or that they were. Now, if they got hit by a police officer, I don't know who that police officer was. So we may as well clear that up now.

They probably did get hit.

Q. All right. They probably got beat, didn't they.

(Mr. Marino)

Objection

A. They didn't get beat, counsel.

A. . . .

There was nothing done to him by the officer that interviewed him in the room at the police station. Now what was done to him by the arresting officer, out there on Mount Union, I don't know.

So I would appreciate it if you quit asking me, because I don't know.

> Now, the man might have been bruised up from coming out of the house where police officers were shot and civilians were shot.
>
> But he was interviewed at the police station and he told us what happened. We asked him why did they do it. He told us - that was the same way it was with Mr. Fowler, Mr. Fowler just wanted it to be that he would tell his whole story in the statement as to why he did this.
>
> He wanted to get that in his statement, and that was in his statement, so he decided to make that. But nobody was harmed in the police station.
>
> The men were caught coming out of the house. He just wanted to tell us why they did this, and that was it.

(Tr. 35, 46-47). (Not reproduced in appendix). The appellate court's "concession by Officer Copeland" based on his gratuitious remark is simply factually unfounded. The record supports that respondents were subject - not to police coercion - but to professional police officers who performed their duty under the Constitution despite the chain of events precipitated by respondents.

Petitioners understand the seriousness of the allegations presented by the respondents with respect to the traditional voluntariness of their confessions. The State

of Ohio, no less than the appellate court below, condemns involuntary confessions and tactics long hoped forever banished. The supposition however, that eight years after the fact, a federal court can hold a "better factfinding" is a slender reed upon which to reopen a full and fair state court determination.

Judge Engel said it best:

> These petitioners have had their day in court. They have been accorded due process in those proceedings and have been found guilty after a fair trial. This litigation should be at rest.

(A-31). This Court should grant certiorari and reverse.

CONCLUSION

Wherefore, for the above reasons, the petition for writ of certiorari should be granted and the decision of the Circuit Court should be reversed.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been forwarded to respondents, Craig Fowler, Charles Jordan, and Larry Johnson, through the office of their counsel, Richard L. Aynes, Appellate Review Office, College of Law, The University of Akron, Akron, Ohio 44325, via the U.S. Mail, this _____day of November, 1982. I further certify that all persons required to be served have been so served. Respondents' addresses are each Southern Ohio Correctional Facility, P. O. Box 45699, Lucasville, Ohio 45699.

SIMON B. KARAS
Counsel of Record

APPENDIX

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No. 80-3583

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CRAIG FOWLER, CHARLES JORDAN and
LARRY JOHNSON,
Petitioners-Appellants,

v.

A. R. JAGO, Superintendent,
Respondent-Appellee.

APPEAL from the United States District Court
for the Northern District of Ohio.

Decided and Filed July 20, 1982.

Before: Edwards, Chief Judge, Engel, Circuit Judge, and Gilmore, District Judge.*

Gilmore, District Judge, delivered the opinion of the Court in which Edwards, Chief Judge, joined. Engel, Circuit Judge, (pp. 18-31) filed a separate dissenting opinion.

Gilmore, District Judge. Habeas petitioners, Craig Fowler, Charles Jordan, and Larry Johnson, with Asa Harris, were indicted by a Cuyahoga County Grand Jury on 33 counts charging them with kidnapping, aggravated burglary, aggravated robbery, and attempted aggravated murder. After a lengthy jury trial in the Court of Common Pleas, petitioners were found guilty of six counts of the indictment: the aggravated burglary and robbery of Andrew Johnson, the aggravated burglary of Judy Winegardner, the aggra-

*Honorable Horace W. Gilmore, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

vated burglary of Catherine O'Brien, the attempted aggravated murder of patrolman William Beranek, and the attempted aggravated murder of Sergeant Richard Spahr. Asa Harris, who had asserted an alibi defense, was acquitted. Substantial sentences were imposed on petitioners.

Circumstances underlying the charges are bizarre. In the evening of May 29, 1974, petitioners forced their way into the home of Judy Weingardner in East Cleveland. Inside were Andrew "School Boy" Jackson and several others. At gun point, everyone was forced to lie down on the floor, and the petitioners proceeded to take money, jewelry, clothing, and household appliances from the home. They loaded all of this material into two automobiles, one belonging to Jackson and the other belonging to petitioner Fowler. All the victims were tied up, except for Jackson and a small child, who were forced into one of petitioners' cars.

Petitioners then drove to Jackson's home, which was also in East Cleveland. Upon entering it, they took money, jewelry, guns, and other items that apparently belonged to Jackson. One of the occupants of Jackson's home was able to telephone the police, who responded to the call. Meanwhile, petitioners started to leave the Jackson home, taking Jackson with them. Jackson, however, broke free and ran to the police, whereupon defendants fled on foot and eventually broke into the home of a family named O'Brien. An extensive police search of the area was commenced and finally focused on O'Brien's house where the petitioners were hiding. When two officers went to the door, one of the occupants told the police that the men they were looking for had been there but had left. The police, however, remaining suspicious, asked if they could search the house. Upon entering the doorway, the police heard someone inside shout that the defendants were inside. The officers tried to run off the porch but rifle fire from the house forced them to take cover. Two other officers, approaching the O'Brien home by automobile, were hit with rifle fire.

The area was quickly saturated with police. The ensuing gun battle lasted nearly an hour and several police officers were wounded. The home was tear gassed, and petitioners eventually fled, taking some of the O'Brien family with them. Two of the O'Briens were shot and wounded. It is not clear who fired the shots, but petitioners assert the police fired the shots hoping to kill petitioners. Fowler, Jordan, and Johnson were arrested around 1:00 a.m. on the morning of May 30 and taken to the East Cleveland Police Station. All were booked and interrogated throughout the morning. Johnson apparently made an oral statement between 4:30 a.m. and 7:00 a.m., and Johnson and Fowler gave oral and written statements some time between 4:00 a.m. and 7:00 a.m.

The petitioners' version of the events differ substantially from those of the Prosecution. Petitioners claim first that "School Boy" Jackson was a known drug pusher and they had gone to visit Jackson to convert him to their Sunni Muslim religious faith and to persuade him to cease his drug trafficking. It was their claim that Jackson had voluntarily accompanied the defendants from the first house to his own in order to rid himself of certain guns which he had stored there. As they were preparing to leave, Jackson pushed Fowler and started running towards the police, who began to fire. Petitioners claim that Jackson, with the aid of the police, had set them up in order to eliminate the petitioners and to protect his narcotic business, which they claimed he operated with the benefit of paid police protection. It was their claim that the exchange of gun fire which occurred in the evening was initiated by the police, and that they had originally fled from the area and sought refuge at the O'Brien house in fear of their lives. They insisted that they at all times believed that the police were in league with Jackson and that, at Jackson's instigation, the police were determined to set up and eliminate the petitioners.

Petitioners exhausted all appeals and now appeal the District Court's denial of their several petitions for writ of habeas corpus filed under 42 U.S.C. Section 2254. They raise seven issues on appeal, but one, the admissibility of confessions made by the petitioners, is dispositive, and requires reversal and remand to the District Court for a hearing on the voluntariness of the confessions.

Petitioners claim that they were abused, both mentally and physically, and thus the confessions which were received into evidence were the product of coercion. The police dispute the allegations of abuse. There is clear evidence from photographs that defendants Fowler and Johnson suffered injuries between approximately 1:00 a.m., at the time of their arrest, and 4:00 to 5:00 a.m., when photographs were made. The police admit that injuries occurred, but state that they occurred during arrest scuffles.

Although it is lengthy and tedious, we must look at the conflicting testimony of the parties to resolve the issue. We start with petitioner Jordan. He testified that he was hit with a gun, struck in the face with the butt of a shotgun, and subjected to racial slurs and profanity shortly after he arrived at the police station. He says that upon arriving at the station he was taken to a room where he was beaten. Later, he was booked and taken to a cell. After about 15 minutes, he was removed for questioning and taken back to this cell. He states that Officer Bayerl was largely responsible for his beating. Jordan also testified that he saw Officer Bayerl strike petitioner Fowler with a shotgun, breaking the handle of the gun.

Petitioner Johnson says he was abused at the time of his arrest. He testified that the police tried to break his arm, stepped on his hands, kicked him, hit him in the stomach with a shotgun butt, and threatened him. He claims that during the ride to the station, he was hit in the head with a blackjack and in the face with a pistol and a flashlight. While entering the station, he states that his head was rammed into a steel door. He further claims

that he was beaten after he got into the station, that a gun was put in his mouth, that an officer spit upon him, and that he was told he would be denied medical attention until after a statement was made. It is undisputed that he suffered injuries to his right eye, had a chipped tooth, and was taken to the hospital several hours after his arrest and received seven stitches in his head. He claims several officers were responsible for his mistreatment.

Petitioner Fowler claims that he was beaten and choked at the arrest scene, and that a cigarette was put out on his leg. He states that he was beaten in the police station with a blackjack, and that a shotgun handle was broken across his jaw. He further claims he saw Jordan being beaten at the station, and that threats were made against his family during the interrogation process.

Mrs. Larry Johnson testified on behalf of the petitioners and said she was not permitted to see her husband until four days after his arrest. When she finally saw him he had a black eye, stitches over his eyebrow, and blood clots around his eye.

In addition to the above testimony, it is undisputed that the petitioners were the subjects of a tear gas bombardment which necessitated medical treatment for some individuals present at the scene. The petitioners received no medical attention prior to their interrogation.

The time sequence of all of the alleged beatings is not totally clear. Petitioners were arrested around 1:00 a.m. and were then taken to the East Cleveland Police Station where they were booked and placed in single-man cells. Formal interrogation seems to have started around 3:00 a.m., and confessions were obtained between 4:30 a.m. and 7:00 a.m.

The police officers' versions of the events dispute most of the petitioners' claims. Officer Staimpel, Bayerl, and Freshwater, among others, testified that they did not abuse the petitioners. The facial marks and bruises observed on petitioners Jordan and Johnson were explained as the product of legitimate encounters at the time of arrest, or at the station house. For example, while

Officer Horval admits that he pushed petitioner Johnson against a steel door at the station, he claims he did it to prevent Johnson from escaping.

The transcript of the state court's evidentiary hearing does not explain the injuries received by petitioner Fowler. Not only do some of Fowler's allegations remain undisputed, the various officers presented conflicting testimony regarding Fowler's arrest and interrogation. There is nothing in the record disputing the allegation that Fowler, as well as the other two petitioners, was suffering from the effects of tear gas at the time of his interrogation. Officer Copeland testified that he first saw Fowler around 4:30 a.m.; he acknowledged that Fowler had already been interrogated. Copeland stated that he took a written statement from Fowler at about 7:30 a.m. Copeland said that Fowler had a cut on his face and was suffering from the effects of tear gas. Copeland admitted that it is possible that Fowler had a black eye, was bruised around the nose, and had a broken and bleeding nose. He admitted that the police probably hit the petitioners.

Officer Farmer's testimony does not coincide with that of Officer Copeland. Farmer testified that he interrogated Fowler for about 45 minutes at 3:30 a.m. while Officers Copeland and Dugan were present. Farmer said that he noted nothing unusual about Fowler's appearance. He claims that Fowler voluntarily agreed to give an oral statement, but would not give a written statement without a lawyer.

The record also reveals undisputed events surrounding petitioner Johnson's arrest which could indicate that his confession was not voluntary. For example, Officer Look took a statement from Johnson at 4:15 a.m. and admitted that Johnson had a cut over his right eye. Look acknowledged that Johnson was later taken to the hospital. It is not clear from the testimony on the record how this injury occurred. Officer Horval, Johnson's arresting officer, testified that Johnson was knocked to the ground during apprehension. Horval stated that Johnson suffered a bruised head. Officer McIntosh, who helped remove

Johnson from the shoot-out scene, testified that he noticed injuries to Johnson's eye before Johnson got in the car. However, McIntosh stated that, if his testimony conflicted with Horval's, he (McIntosh) was mistaken. Officer Kaminski, who interrogated Johnson around 4:00 a.m., said Johnson may have had a puffed eye.

Finally, it was undisputed that petitioner Johnson was stripped naked in the presence of a police woman.

In the face of these highly disputed facts and contradictory testimony, the state trial judge made only the following findings at the conclusion of the hearing: "With respect to the motion to suppress the statements, I find the statements were voluntarily given and were not given because of threats, coercion, and abuse." No further findings were made.

The statements were admitted at trial, and petitioners were tried and found guilty, as indicated above. Substantial prison sentences were imposed and all state appeals were exhausted.

Petitioners then filed a habeas corpus petition in the United States District Court for the Northern District of Ohio. Judge Thomas, after reviewing the record made in the state court, denied the petition without an evidentiary hearing, concluding that the state court's determination was fairly supported by the record. We find that the district judge erred in relying on the conclusions of the state trial judge, and that this matter must be reversed and remanded to Judge Thomas for a testimonial hearing by him on the voluntariness and admissibility of the confessions involved.

Federal courts reviewing state criminal convictions on writs of habeas corpus have broad power to hold *de novo* evidentiary hearings. *Townsend v. Sain*, 372 U.S. 293 (1963). The decision to hold an evidentiary hearing is, in many cases, within the sound discretion of the trial judge. In certain situations, however, the exercise of the federal court's power to try the facts anew is mandated. In *Townsend, supra*, the Supreme Court held that "a federal

evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts." 372 U.S. at 312-13. The Court further held that an evidentiary hearing must be granted under the following circumstances:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

372 U.S. at 313.

Thus, in order to eliminate the need for an independent federal evidentiary hearing, the district court must examine the findings of the state court to determine whether the state trier of fact reliably found the material facts and rejected the claim on its merits. In some situtations, where the state court has not articulated express findings, it may be possible for the federal court to reconstruct the findings of the state trier of fact. If these findings can be inferred from the record, the federal court need not hold its own evidentiary hearing.

In 1966, three years after the decision in *Townsend*, Congress codified a good part of the *Townsend* holding in 28 U.S.C. Section 2254(d),[1] Act of November 2, 1966,

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[1]28 U.S.C. Section 2254(d) provides that in any habeas corpus proceeding a determination after hearing on the merits of a factual issue made by a state court of competent jurisdiction, evidenced by a written finding, or other reliable or adequate written indicia, will be presumed to be correct. There are eight exceptions to the presumption of correctness, including a finding that the merits of the factual dispute were not resolved by the state court hearing or that the factual determination of the state court was not fairly supported by the record.

80 Stat. 1105. Although on its face the statute does not govern when a federal court must hold an independent evidentiary hearing,[2] it does require that state court findings of fact made after a full and fair hearing are entitled to a presumption of correctness. If the findings of the state court meet the indicia outlined in Section 2254(d), the state court determination is presumed to be correct. Nevertheless, the presumption and special burden of proof do not operate at all if any one of the eight specified exceptions to the statute exists. These eight exceptions appear to subsume the six *Townsend* criteria. Thus, the determination that one of the six *Townsend* criteria exists necessarily resolves the Section 2254(d) burden of proof issue. If one of the *Townsend* criteria is present, the district court must hold an evidentiary hearing and the presumption of correctness does not apply. Conversely, if the presumption is operative, an evidentiary hearing cannot be mandated.

Under both *Townsend* and Section 2254(d), therefore, the district court must conduct an inquiry into whether the state court has adequately resolved the factual issues contained in the petitioner's constitutional claim.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), at 323, the Supreme Court defined the broader duties of federal courts in dealing with state habeas cases. It said:

> "The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state post-conviction remedies to redress possible error.... *What it does not presume is that these state proceedings will always be without error in a constitutional sense.* The duty of a federal habeas corpus

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[2]In the dissent to *LaVallee v. Delle Rose*, 410 U.S. 690, 701 n. 2 (1972), Justice Marshall says, "... [T]he question whether such a hearing is appropriate on federal habeas corpus continues to be controlled exclusively by our decision in *Townsend v. Sain* even after the enactment of Section 2254(d). See Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1141 (1970...."

> court to appraise a claim that constitutional error did occur—reflecting as it does the belief that the 'finality' of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right—is not one that can be so lightly abjured." (emphasis added)

This language provides a succinct explanation of the role Section 2254(d) plays in collateral view of constitutional error in state court findings of fact. It clearly points up the constitutional need for federal courts to know that state court findings are reliable.

Federal courts have an obligation to ascertain whether the state court found the relevant facts and applied the correct standard of law. As pointed out in *United States ex. rel. Williams v. LaVallee*, 487 F.2d 1006 (2d Cir. 1973):

> "[T]he habeas court must itself insure that the relevant facts were found and that the correct legal standard was applied to them. [cites ommited] It is only where "it can scarcely be doubted" that the relevant factual issues have been resolved against the petitioner *and* that 'there is no evidence that the state trier utilized the wrong legal standard' that Section 2254 requires the habeas court to dismiss a subsequent petition without an independent evidentiary hearing." (emphasis in original)

Id. at 1010-11.

Thus, this court must examine the findings of the state judge to determine if they are adequate to support the presumption of correctness under Section 2254(d). These findings must be sufficient to enable the district court to fulfill its obligation to determine that they are supported by the evidence and that the correct standards of law were applied. The federal district court may dismiss the petition without a hearing only if the findings of the state judge are sufficient to enable the federal district judge to

determine that they are supported by the evidence and that the correct standards of law were applied.

In *LaVallee v. Delle Rose*, 410 U.S. 690, 93 S. Ct. 1203, 35 L.Ed. 2d 637 (1973), the Supreme Court discussed the adequacy of the state court's findings under 28 U.S.C. Section 2254(d).[3] In *LaVallee*, the respondent's conviction for murder was based on two confessions that were found to be voluntary in subsequent New York state court proceedings. The state court heard testimony and, after an extensive summary of the evidence, concluded:

> "On all the evidence, both at the trial and at the hearing and after considering the totality of the circumstances, including the omission to warn defendant of his right to counsel and his right against self incrimination, I find and decide that the respective confessions to the police and district attorney were, in all respects, voluntary and legally admissible in evidence at the trial. . ."

410 U.S. at 691.

In subsequent federal habeas proceedings, the district court felt unable to accord the state court the presumption of correctness because the state trial judge did not articulate to what extent he credited or rejected the respondent's testimony. The district court held its own hearing, found the confession involuntary, and ordered the respondent discharged unless he was retried. The Court of Appeals affirmed on the ground that the state court's factual determination on voluntariness did not meet the standards of 28 U.S.C. Section 2254(d).

The United States Supreme Court reversed in a five to four opinion, holding that the state trial judge's determination of the totality of the circumstances evidences that he had applied correct voluntariness standards. The Court further noted that since the district court could have

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[3]As indicated above, state court findings must meet the same standards under both *Townsend* and Section 2254(d).

been reasonably certain that the state trial judge would have granted relief if he had believed respondent's testimony, the federal courts erroneously concluded that the opinion of the state trial court did not meet the requirements of Section 2254(d)(1).

In LaVallee, the petitioner relied primarily on his own testimony to prove involuntariness, and ended up contradicting his own claims. The state presented evidence directly refuting the petitioner's allegations. The Supreme Court's opinion says, in essence, that the district court was required to assume that the state court had found that the petitioner's allegations were incredible. This assumption was based on the theory that the state court would have granted relief if it had decided to believe the petitioner, since there was every indication that the state trial judge applied the correct standards.

Although *LaVallee* emphasizes that federal courts must, in general, defer to the determination of the state trier of fact and assume that the state trier correctly resolved the facts, such an assumption is not warranted in all cases. In *Townsend, supra,* the Court anticipated the situation we face here.

> "If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.
>
> "Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an

> error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. Of course, the possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied.
>
> * * *
>
> Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held."

372 U.S. 314 through 316.

Thus, *Townsend* clearly indicates that the district court's ability to infer factual findings and the deference accorded state court decisions depends upon the facts of the individual cases.[4] Indeed, the Court in *LaVallee* indicated the same standard when it said:

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[4]We are well aware that the opinion in *Townsend* states: "Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession." 372 U.S. at 315. The problem in this case is that we do not know, because of the complexity of the record, that the state court necessarily found the facts against the petitioner.

> "Under these circumstances, we think the District Court could have been reasonably certain that the state court would have granted relief if it had believed respondent's allegations."

410 U.S. at 695.

As noted above, *LaVallee* indicates that the district court must accept the findings and conclusions of the state judge only if it "can scarcely be doubted" that the state court resolved all relevant factual issues against the petitioner and if "there is no evidence that the state trier utilized the wrong standards." 410 U.S. at 692, 695. *See United States ex rel. Williams v. LaVallee*, 487 F.2d 1006, 1011 (2d Cir. 1973).

The state judge's findings in the instant case cannot meet these exacting standards. The findings are conclusory and do not give assurance that the trier of fact applied the correct standards of law. Moreover, in contrast to *LaVallee*, the facts in the instant case do not mandate the assuption that the state court judge believed the police because he found that the confessions were voluntary. The question here is not just one of the petitioners' credibility; rather, there is undisputed evidence that could indicate coercion, as well as an admission by the prosecutor that the petitioners "were not treated gently."[5]

The testimony offered by the police was often contradictory and did not totally refute petitioners' claims. For example, Officer Copeland conceded that Fowler had probably been struck. He also conceded that Fowler's face showed evidence of some trauma. A comparison of pictures taken of Fowler at the time of his arrest with identification photos at the station indicates that Fowler's face sustained some type of blow. These pictures and

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[5]It is important to remember that the interrogation in this case took place under volatile and emotional circumstances. The petitioners were apprehended after a gun battle which lasted at least one hour and involved extensive tear gas bombardment, the wounding of two police officers and the wounding of two civilians.

the testimony of Officer Copeland remain entirely unexplained.

Even if we assume that the state judge resolved all factual disputes against the petitioners, we still are faced with unexplained events that could possibly render the confessions involuntary. This indicates that the state court either did not resolve the merits or failed to apply the proper standard. Did the state court find, for example, that there was coercion and physical violence, but that the confessions were still voluntary? Or, did it conclude that no coercion was used against petitioners? If it reached the latter conclusion, the findings would be clearly erroneous, for there is clear evidence on the record indicating that force and coercion were used against petitioners, particularly with reference to Fowler. This court cannot evaluate the appropriateness of the state court's conclusion because the state trial judge has given no indication that he applied the appropriate legal standard. The factual disputes in this case are so frequent and so dramatic that they call for specific credibility resolution by a judge.

Here we do not know the basis for the findings of the state court. This case is not like *LaVallee*, where the findings of the state court could be easily inferred because of a clear-cut conflict in testimony. The conflict here cannot be resolved by believing one witness against another. The fact situation presents far too many relevant conflicts in testimony.

Since we cannot determine the basis for the state court's conclusion, we are of the opinion that the district judge should not have accorded the state trial judge's findings a presumption of correctness, but should have held an evidentiary hearing. The need for such a hearing is compelled by the failure of the state trial judge to articulate the legal standard applied in making the determination of voluntariness, or the factual findings

upon which it was based in light of the complex facts of this case.[6]

In reaching this conclusion, the court is cognizant of its responsibility to state reasons for concluding that one or more of the factors listed in Section 2254(d) are present. *Sumner v. Mata*, 449 U.S. 539 (1981). We believe that the long reiteration of the questions raised by the testimony at the state court hearing fulfills this obligation.

Nor is the court unmindful of the admonition of the Supreme Court in its most recent decision in the *Sumner* case. *Sumner v. Mata*, 50 U.S.L.W. 3760 (1982). We are fully aware that the underlying facts as found by the state court are governed by a statutory presumption of correctness. As stated in *Sumner II*, we are bound to defer to the state court's findings of fact, "unless one of the factors listed in Section 2254(d) is found." *Sumner v. Mata, supra*, at 3761. After a review of the facts in this case, we find that the state court failed to resolve the merits of the factual dispute as required by Section 2254(d)(1).

This court cannot determine the basis for the state trial judge's decision, and, we, therefore, cannot assume that the state trial judge did not reach an erroneous decision. The district court cannot infer findings and assume the proper standard was applied because the findings cannot be reconstructed from an examination of the record. Where findings cannot be inferred, and where there has been no articulation of the standards used by the state trier of fact, the district court must hold its own hearing.[7]

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[6]In reaching this conclusion, we are not unaware of *Berry v. Cowan*, 497 F. 2d 1274 (6th Cir. 1974). There the Court found that the state court demonstrated that proper constitutional standards had been met. Here the record does not show that proper constitutional standards were met.

[7]We do not suggest that the conclusion of the state trial judge was wrong. We do not know. What was wrong was his failure to give articulated reasons for his conclusions in a case in which it was not obvious why he reached his conclusions.

Further, the ultimate question as to the constitutional admissibility of the confession in this case is a mixed question of fact and law that is not governed by Section 2254. The Supreme Court, in *Sumner v. Mata, supra,* said:

> "We agree with the Court of Appeals that the ultimate question as to the constitutionality of the pretrial identification procedures used in this case is a mixed question of law and fact that is not governed by Section 2254. In deciding this question, the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard."

50 U.S.L.W. at 3761.

Therefore, for the reasons given, this case is remanded to the district court for the purpose of holding a full testimonial hearing as to the admissibility of the confessions and making findings of fact and law thereupon. This court retains no further jurisdiction. Reversed and remanded.

Engel, Circuit Judge, dissenting. The unusual nature of the occurrences set out in the majority opinion and the fact that several police officers were injured during the affray have required us all to scrutinize the record of the trial proceedings with exceptional care. Under the recited circumstances the potential for an excessive response by the police is all too real, even in the best regulated law enforcement agencies. While I therefore have great respect for the views expressed by the majority, I must nevertheless dissent.

I would affirm the decision of United States District Judge William K. Thomas because both he and the state trial court have in my judgment complied with the requirements of 28 U.S.C. Section 2254 and of *Townsend v. Sain*, 372 U.S. 293 (1963). With those conditions met, it was necessary for Judge Thomas, as it is for us, to respect the finality of the state court factual determinations in a criminal case over which the state court possessed original jurisdiction.

On May 29, 1974, petitioners were involved in a violent altercation with the police in which several policemen and two other citizens were injured by gunfire. Following their arrest, petitioners were taken to the police station where each confessed. Prior to trial, the state court held an evidentiary hearing regarding the admissibility of petitioners' confessions. This hearing lasted three days, included the testimony of eighteen witnesses (the three petitioners, the wives of petitioners Johnson and Jordan, and thirteen policemen), and generated over 600 pages of transcript and a number of photographic exhibits. These witnesses presented conflicting testimony. The petitioners testified that they had been subjected to physical abuse and threats by the police. The officers testified basically that any injuries which occurred were a result of force needed to arrest petitioners, that petitioners were not abused or threatened at the station, and that petitioners' statements were voluntary.

At the conclusion of the lengthy suppression hearing, the trial court ruled:

> I find the statements were voluntarily given and were not given because of threats, coercion and abuse.

Transcript at 662. The state trial judge did suppress a written statement made by petitioner Fowler because he found that statement, although otherwise voluntary, had been made after Fowler requested counsel. With the other confessions admitted, petitioners were convicted by a jury of six counts involving charges of aggravated burglary and attempted aggravated murder.

On appeal in the state system, the Eighth District of the Ohio Court of Appeals affirmed the trial court judgment. That court found petitioners' claim that their confessions were involuntary to be without merit. In so holding it observed that it had examined pictures taken of petitioners following interrogation and that "[t]he photographs of the [petitioners] do not demonstrate they had been beaten as the injuries were minor and insignificant." *Ohio v. Fowler*, No. 34287, slip op. at 4 (Ohio Ct. App. Dec. 11, 1975). Petitioners' motions for leave to appeal to the Supreme Court of Ohio were denied.

Petitioners filed petitions for writs of habeas corpus in district court. Judge Thomas, after noting that he had read the entire record, observed:

> The testimony of the police witnesses was diametrically opposed to that of petitioners with respect to issues of "deception and physical and mental coercion."
>
> * * *
>
> Whether petitioners in this case were subjected to verbal and physical abuse and whether their confessions were the product of any such abuse, are factual issues that were fully and fairly litigated in the trial court at the hearing in which petitioners were represented by counsel. Therefore, under 28 U.S.C. Section 2254(d), the finding of the state court that the petitioners' confessions were not the prod-

> uct of abuse or coercion is presumed to be correct unless that "factual determination is not supported by the record." . . . This court having considered as a whole that part of the record pertinent to the issue of coercion, finds that the state court's determination is fairly supported by the record.

Fowler v. Jago, Nos. C79-64, C79-65, C79-66, mem. op. at 7-8 (N.D. Ohio June 16, 1980). The petitions were accordingly denied.

Now, more than eight years after the events which gave rise to petitioners' convictions, the majority ruling orders a remand to the district court for a second evidenitary hearing to determine the voluntariness of certain statements made by petitioners after they were arrested on the night of the crimes. That hearing must necessarily be held after the memories of the witnesses have become faded and probably jaded by time, assuming they can be located. The majority so holds although there is not the slightest suggestion in the comprehensive record before us, to paraphrase 28 U.S.C. Section 2254, that the fact-finding procedures employed by the state court, which spread over many days and covered more than 600 pages of trial transcript, were inadequate to afford a full and fair hearing; nor that the material facts were not adequately developed at the state court hearing, as shown so clearly by the extended statement of facts in the majority opinion; nor that the state court lacked jurisdiction in the state criminal proceedings; nor that the petitioners were denied counsel, when it is clear that both the state and the petitioners were fully and ably represented by competent, aggressive, well-prepared counsel; nor that the applicants received anything short of a full, fair, and adequate hearing in the State court proceeding; nor that the petitioners were otherwise deprived of due process in the state court proceedings; nor, finally, that the factual determinations by the state trial judge were not fairly supported by the record in the state court proceedings.

None of the foregoing observations, based upon 28 U.S.C. Section 2254 and upon the language of *Townsend v. Sain*, is seriously disputed by the majority. Instead, it predicates its remand to the district court for a new and supposedly improved evidentiary hearing solely upon its conclusion that, in the language of 28 U.S.C. Section 2254(d)(1), "the merits of the factual dispute were not resolved in the State court hearing." It so holds because it finds inadequate the determination of the state trial judge that the statements which were allowed into evidence at the trial "were voluntarily given and *were not given because of threats, coercion and abuse.*" (emphasis added).

I read the majority opinion to hold that the district judge committed two errors. First, the majority concludes that it was improper to apply a presumption of correctness to the state court findings on voluntariness. Second, it finds that the district court should have held an evidentiary hearing instead of relying on an evaluation of the state court record.[1] In so ruling, the majority concludes that the factual finding of the state trial judge on voluntariness was not entitled to the section 2254(d) presumption of correctness because of "the failure of the state trial judge to articulate the legal standard applied in making the determination of voluntariness, or the factual findings upon which it was based in light of the complex facts of this case." Majority Op. at 15 (footnote omitted).

In my opinion, a proper respect for the teachings of *LaVallee v. Delle Rose*, 410 U.S. 690 (1973), and *Townsend v. Sain*, and for the Congressional mandate of 28 U.S.C.

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[1]Significantly, petitioners' brief in this court does not assign as error any failure of the district court to hold a new hearing. Instead, the brief states that "the district court erred in relying upon the 'findings' of the state court with respect to the voluntariness of [petitioners'] alleged statements and failing to make an independent determination upon those issues." Appellants' Brief at p. 11. Petitioners argue that the district court had a duty to make an independent evaluation of the state court record, but there is no mention of a need for a new hearing or for additional evidence.

Section 2254, justifiably requires us to uphold the decision of the district judge denying habeas relief.

Congress carefully provided in 28 U.S.C. Section 2254(d)[2] for a presumption of correctness of factual findings made after a hearing by a state court of competent jurisdiction. Section 2254(d) commands that these factual findings "shall" be presumed correct unless any one of eight specific circumstances should exist. Clearly, the statute admonishes federal courts to be respectful of the

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[2]28 U.S.C. Section 2254(d) provides:

In any proceeding instituted by a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

integrity of their sister courts in the states and of the coequal ability of state courts to protect the constitutional rights of persons accused of crime.

In *LaVallee v. Delle Rose*, the Supreme Court considered and rejected arguments nearly identical to those relied upon by the majority here. Delle Rose had been convicted in New York state court of the premediated murder of his wife. Two confessions were admitted into evidence after having been found voluntary. On appeal, the New York Court of Appeals directed the trial court to hold a special hearing on voluntariness, after which the trial court summarized the evidence and concluded:

> On all the evidence both at the trial and at the hearing, and after considering the totality of the circumstances, including the omission to warn defendant of his right to counsel and his right against self-incrimination, *I find and decide that the respective confessions* to the police and district attorney *were, in all respects, voluntary and legally admissible* in evidence at the trial. . . .

(emphasis added). The trial court made no further findings. In subsequent habeas corpus proceedings, the district court held that because the state trial judge had failed to explain precisely how far he credited the defendant's testimony as well as other evidence before him, there was no "adequate" factual determination within the meaning of section 2254(d). The district court then held its

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And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

own hearing and thereafter found the confessions to be involuntary.

In affirming, the Second Circuit stated that while New York's state judges were competent and willing to apply the rules on the admissibility of confessions,

> we cannot tell in this instance whether the New York courts credited Delle Rose's story of the circumstances surrounding his confessions but still held these to have been voluntary, a conclusion to which we could not agree, or based their holding of voluntariness on a partial or complete rejection of his testimony. . . .

United Sates ex rel. Delle Rose v. LaVallee, 468 F.2d 1288, 1290 (2d Cir. 1972), *rev'd*, 410 U.S. 690 (1973).

The Supreme Court reversed. A majority of the Court concluded that the opinion of the trial court met the requirements for the presumption of correctness of section 2254(d). The Court relied on language from *Townsend v. Sain* to hold that where a trial judge refuses to exclude a confession in the face of allegations of "third-degree" methods of interrogation by the police in a habeas proceeding " 'the district judge may assume that the state trier found the facts against the petitioner. . . .' " *LaVallee v. Delle Rose, supra*, 410 U.S. at 694. The Court also stated there was "no evidence that the state trier utilized the wrong standard. . . ." 410 U.S. at 695. Therefore, the finding of the state trial court on voluntariness was entitled to the presumption of correctness from 28 U.S.C. Section 2254(d), and Delle Rose had the burden "to establish in the District Court by convincing evidence that the state court's determination was erroneous." *Id.*

Similarly, in the present case, the trial judge had to decide whether to believe the petitioners or the police. As Judge Thomas stated: "there was conflicting testimony about whether petitioners were subjected to physical and verbal abuse. Resolution of this issue was largely a matter of credibility." *Fowler v. Jago*, Nos. C79-64, C79-

65, C79-77, *supra* at 8. After an extensive hearing, which the majority has not challenged as to its fairness or completeness, the trial judge resolved the factual questions against petitioners. Not only did he find the confessions to be voluntary, as did the state judge in *LaVallee*, but he also found that they were not made "because of threats, coercion and abuse." This is more precise than the finding made in *LaVallee*.

Significant to me is the absence in the majority opinion, or in the record upon which it is based, of any suggestion that the state trial judge was not fully aware and respectful of the federal constitutional requirements concerning the voluntariness of confessions under the Fifth and Fourteenth Amendments. Indeed, not mentioned in the majority opinion is the fact that the state trial judge suppressed one proffered statement because he found it to violate *Miranda v. Arizona*, 384 U.S. 436 (1966). It is, therefore, even more reasonable for us, here, to assume that the state trial judge would have granted relief had he believed the evidence supportive of the petitioners' claim at the suppression hearing. I respectfully suggest that what is characterized by the majority as uncertainty regarding the legal standard employed in state court is simply an honest disagreement with the conclusions which the state trial judge so clearly reached respecting voluntariness. This is not and should not be, in our constitutional system of joint federal-state responsibility, a valid basis for the interposition of the differing views of federal judges.

Although it acknowledges that the "police officers' versions of the events dispute most of the petitioner's claims," Majority Op. at 5, the majority is troubled by inconsistencies found in some testimony of the police. After reading the record, I do not have the same problems. I agree with Judge Thomas that the findings of the state trial judge, though succinct to the point of being terse, are fairly supported by the entire record, judged as a whole.

The inherently intimidating nature of custodial interrogation has been fully catalogued in *Miranda v. Arizona, supra.* While perhaps the frequency of abuse may have diminished in the sixteen intervening years, my own judicial experience confirms the observation of Chief Justice Warren that "[t]he use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country." *Id.* at 446. Thus the burden is cast upon the government to prove by a preponderance of the evidence the voluntariness of the defendant's confession before it may be used against him at trial. *Lego v. Twomey,* 404 U.S. 477 (1972). As noted by Chief Justice Warren in *Miranda,* one of the particularly evil by-products of coercive interrogation is its basic unreliability as evidence of guilt. *See Miranda, supra,* 384 U.S. at 455 n. 24. Nevertheless, not all custodial interrogations are invariably coercive in fact, nor are confessions or statements gained during such interrogation invariably involuntary. If they were, they would probably be barred on the basis of unreliability alone.

Human motivation is complex, and the need to explain one's actions may be overwhelming, even though later it may appear to have been unwise. "If it is true that confession is good for the soul, it must be acknowledged that a free and honest admission of guilt is perhaps the first and largest step toward ultimate rehabilitation." *U.S. v. Derrick,* 519 F.2d 1,4 (6th Cir. 1975).[3]

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[3]If we are to credit the testimony of Officer Horval, petitioner Johnson's statements could present just such an example. From Horval's testimony, it appears that Johnson was read the *Miranda* warnings upon being placed in the police cruiser and that Johnson stated he understood his rights. Transcript at 195. The officer then told Johnson that two policemen had been shot and asked him why. According to Officer Horval, Johnson responded that "he was after Schoolboy, and there was nothing meant against the police." Transcript at 204. Obviously, Johnson could have been terrified of the police, offering an explanation which he hoped might protect him from a dreaded "third degree" interrogation back at the station. On the other hand, as a purported member of a religious sect, Johnson may have been genuinely surprised at the unusual twist of events. He may even have been regretful that a robbery of someone

While I suppose the trial judge could have credited petitioners' story that they were on a peaceful religious mission to "convert" their victim, he could certainly with equal plausibility have concluded that it was patently incredible. They had to be aware that the evidence of their own violent conduct on the evening in question was overwhelming. I believe that the state trial judge was fully entitled to discredit not only their testimony concerning the night's events altogether, but also was entitled to discount the petitioners' description of the causes and extent of their alleged injuries and any impact those events might have had on the voluntariness of their statements. Obviously that is exactly what he did. While the majority points to discrepancies in the evidence on behalf of the state, common sense suggests that such discrepancies are typical of the truth-seeking process and may be more supportive of the ultimate finding than unfailing consistency.[4]

To avoid the rule of *LaVallee*, the majority argues that this case is too "complex" for a federal district court to defer to terse state court findings. Essentially, the majority would require specific resolution of credibility conflicts in testimony by a state court before the presumption of correctness of 28 U.S.C. Section 2254(d) would arise. This precise argument was made by Justice Marshall

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who he believed was selling drugs had escalated into an invasion of the rights of others toward whom he bore no personal malice whatever. I do not suggest which, if either, explanation is the correct one. I do suggest that the quality of the record and the accuracy of findings based upon it is not likely at this time to be significantly improved, even taking into account the consummate skill and refined judgment which Judge Thomas could be expected to contribute.

[4]Although the accounts of the police witnesses varied somewhat as to the time of questioning, the exact questions asked, and petitioners' responses, there was unanimous agreement among the police that petitioners had not been physically abused or threatened at the police station. *See* Transcript at 35, 43, 47 (Officer Copeland testifying that petitioners "didn't get beaten," were not threatened, and were not harmed at the police station); Transcript at 76-77 (Officer Look testifying that petitioner Johnson was not threatened at the station); Transcript at

when he dissented in *LaVallee*. 410 U.S. at 700.[5] That argument, however, failed to persuade a majority of the Court in *LaVallee*. Nothing indicates that the Supreme Court would be more receptive to it today.

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432 (Officer McIntosh testifying that he did not strike petitioner Johnson with a flashlight while arresting him); Transcript at 512 (Officer Rose testifying that no acts of violence occurred against Fowler or Jordan in the jail); Transcript at 573 (Officer Staimpel testifying that there was no indication that petitioner Jordan had been beaten or suffered facial lacerations); and Transcript at 607 (Officer Bayerl testifying that he did not strike petitioner Jordan and that he saw no one beaten). As the majority notes, the testimony of the police indicated that petitioner Johnson suffered a slight cut and bruise around his right eye as a result of altercations and scuffles during arrest and transportation to the station. The testifying officers differed slightly as to when Johnson suffered the injury, which the Ohio appeals court found to be "minor and insignificant," but their testimony showed no use of unreasonable force such as might cause petitioners' confessions to be involuntary. In no sense did the police substantiate or lend credence to petitioners' versions of events that police beat them with gun butts, pistols and flashlights and threaten them and their families. Had the state judge credited petitioners' allegations, I believe, as the Supreme Court stated in *LaVallee*, "the District Court could have been reasonably certain that the state court would have granted relief." 410 U.S. at 695.

Also, I believe that the police testimony regarding the nature of events surrounding petitioners' arrest is adequate explanation of Fowler's minor injuries that are shown in his identification photo. Even if the facts surrounding Fowler's arrest were not sufficiently developed on the record, this would not justify a remand for petitioners Johnson and Jordan as well.

[5]In his dissent Justice Marshall stated:

> It is possible, of course, that the state court rejected all of respondent's testimony as incredible and therefore properly held the confessions voluntary. On the other hand, if the state court had believed all of respondent's contentions, it would undoubtedly have found the confessions involuntary. There remains, however, the third possibility that the state court believed some of respondent's contentions and rejected others. It is this last possibility that makes for substantial uncertainty in a factually complex case such as this as to whether the state court correctly applied the abstract legal standard and did not, instead, commit constitutional error. Due to the unrevealing nature of the state court's decision, it is impossible to say that that court may not have credited a sufficient

The majority suggests that a finding that no coercion was used by the police against the petitioners would be "clearly erroneous." To support this conclusion, the majority points to photographs taken of the petitioners at the time of arrest and to those taken by the police at the stat ion for identification. There is no mention, however, of a finding by the Ohio Court of Appeals that "[t]he photographs of the appellants do not demonstrate they had been beaten as the injuries were minor and insignificant." Under *Sumner v. Mata*, 449 U.S. 539, 546 (1981) (*Sumner I*), the deference to state factual determinations applies to findings both by state trial and appellate courts. *Sumner I* and *Sumner v. Mata*, 50 U.S.L.W. 3760 (March 23, 1982) (*Sumner II*), emphasize that a federal court must articulate which factor from section 2254(d) was found if the court refuses to defer to the state court. In disregarding the Ohio appellate court's evaluation of the photographs, the majority here does not indicate that section of 2254(d) upon which it relies.[6]

While I personally do not entertain such a view, it must be observed that on this record a more probative issue could be raised whether *any* statements or confessions, coming in the immediate aftermath of admittedly violent

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portion of respondent's story to establish, under the controlling standard, the involuntariness of his confessions and nevertheless have reached an erroneous conclusion of voluntariness because the question may have been a close one on the facts that it accepted. It is this inherent uncertainty as to what the state court may have believed or disbelieved that justified the action of the District Court and the Court of Appeals in this case.

Lavallee, supra, 410 U.S. at 700.

[6]In *Sumner II*, the Supreme Court said that the presumption of Section 2254(d) does not apply to the ultimate question of the constitutionality of pretrial identification procedures because that is a "mixed question of fact and law." 50 U.S.L.W. at 3761. In my opinion, *Sumner II* does not require reversal of Judge Thomas. In the instant case, the trial court's determination included factual findings as well as the ultimate determination that the statements were "voluntary." Also, the Court in *Sumner II* gave no signal that the validity of *LaVallee* was in doubt.

circumstances, could *ever* be voluntary, as a matter of law, no matter how that violence came about or how it may have or have not affected the petitioners when they made their statements. Such a view might arguably hold that upon this record the findings of the state trial judge that the statements were "voluntary, and not given because of threats, coercion or abuse" were "not fairly supported by the record," as provided in section 2254(d)(8). Nevertheless the majority has carefully avoided this conclusion. It implies that somehow if, after a new hearing, the federal district judge reaches the same conclusions but buttresses it with more complete findings concerning credibility and resolution of apparent conflicts in the testimony, the denial of the writ will then be upheld.

The specificity which the majority would impose upon the state judge, as a condition to acceptance of his factual findings, while undoubtedly desirable, far exceeds that held fully adequate in *LaVallee v. Della Rose* and, I submit, that usually required of trial judges in both state and federal systems. Upon the strength of the majority's opinion, if it stands, it will not hereafter be difficult to disregard the findings of state trial judges by merely pointing to some conflict in the testimony and holding that it should have been specifically resolved by written findings. We shall then be back where we were before Chief Justice Warren's admonitions of *Townsend v. Sain* were incorporated into section 2254.

I also respectfully disagree with the majority's conclusion here that Judge Thomas erred in not holding a separate evidentiary hearing on the question of voluntariness. In my opinion this result is contrary to the Supreme Court's decision in *Townsend v. Sain*. There the Court emphasized that express findings by a state court judge are not always necessary: "It may. . .be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia." 372 U.S. at 314. While the Court in *Townsend* did in fact remand for an evidentiary hearing, it also was careful to observe:

> [T]he coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts. . . . Thus, if third degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district court may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession.

372 U.S. at 314-15. That is precisely the situation here.

There is no suggestion in the majority opinion that the state trial judge who presided over the case was biased, or not competent to hear the defendants' motions to suppress or to rule upon them intelligently and fairly. While during the evidentiary hearing, the trial judge occasionally expressed some frustration with the aggressive conduct of defendants' counsel, in my judgment, he presided over the hearing in as fair and intelligent a manner as one could reasonably expect in either the federal or the state system. The majority opinion does not suggest otherwise or provide any reason why another hearing, presided over by a federal instead of a state judge, could produce a more just or objective result.[7]

These petitioners have had their day in court. They have been accorded due process in those proceedings and have been found guilty after a fair trial. This litigation should be at rest.

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[7]Because I would not remand this case to the district court for a new hearing, I would reach the other issues presented by petitioners in their appeal. Upon consideration of these issues, I do not believe they provide grounds for reversal of the district court judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CRAIG FOWLER,
CHARLES JORDAN,
LARRY JOHNSON
Petitioners

vs.

A. R. JAGO, Supt.
Respondent

Nos. C79-64, C79-65, C79-66

FILED June 16, 1980

The Court having filed its Memorandum and Order denying Petitioners' petitions for Writs of Habeas Corpus, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

IT IS ORDERED that the Petitioners' petitions for Writs of Habeas Corpus are hereby denied.

/s/ William K. Thomas
U.S.D.C. Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
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CRAIG FOWLER,
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Petitioners

v.

A. R. JAGO, Supt.

Respondent

Nos. C79-64, C79-65, C79-66

MEMORANDUM AND ORDER

FILED, June 16, 1980

THOMAS, J.

Petitioners bring this action seeking a writ of habeas corpus under 28 U.S.C. Section 2254, claiming that their convictions of two counts of aggravated burglary, two counts of aggravated robbery, and two counts of attempted aggravated murder were obtained in violation of their constitutional rights. Respondent, in whose custody the petitioners now are, admits that petitioners have exhausted state remedies with respect to each of the eight grounds they raise, but denies that they are entitled to relief.

Petitioners were jointly tried in state court and now assert identical grounds for relief. Their cases have therefore been consolidated. Before considering petitioners' claims, a statement of the pertinent facts will be given.

I.
THE FACTS

Many of the facts underlying the charges against petitioners were disputed. The court will therefore outline the state's theory of the case and the evidence it adduced to support its theory and then describe petitioners' defense to the charges. This outline is based on reading 16 volumes of the trial transcript on deposit in the state court of appeals.

A.

The state claimed that on the evening of May 29, 1974, petitioners and one Asa Harris, went to the home of Judy Winegardner at 13615 Fourth Street in East Cleveland, Ohio. Several individuals were present at the home at that time, including Andrew "Schoolboy" Jackson, Sr. Petitioners and Asa Harris broke into the home at gunpoint, robbed Schoolboy of his rings and money, and took televisions, stereo equipment, clothing and other items from the home. These items were loaded into a Cadillac belonging to Schoolboy and a Thunderbird belonging to petitioner Craig Fowler. During the robbery, Judy Winegardner and Andrew Jackson, Jr. returned to the home from a shopping trip, and Ms. Winegardner was robbed of two rings. Petitioners and Asa Harris then tied up all but one of the home's occupants other than Schoolboy, who was forced to go along with them in the car.

Petitioners and Asa Harris took Schoolboy to his home at 13736 Euclid Avenue, also in East Cleveland, Ohio. Several individuals were present in the home. Petitioners and Asa Harris forced their way into the home and took money, jewelry, guns, a television set, and other items from the home. Joyce Gray, who lived on the third floor of the house, called the police. Becoming aware of the presence of police, petitioners and Asa Harris left the home on foot, taking Schoolboy with them. Schoolboy

broke free and ran to the police. Petitioners and Asa Harris parted company, and petitioners ran through backyards in the neighboring area until they reached the home of Catherine O'Brien.

Petitioners forced their way into the O'Brien home and requested keys for one of the O'Brien's cars. After obtaining the keys, petitioners attempted to leave in the car but were unable to do so because the area was saturated with police. Petitioners ran back into the O'Brien home, at which eight members of the O'Brien family were present. The police were by that time conducting an extensive search of the area and came to the O'Brien home. Petitioners told Michael O'Brien to answer the door when the police came and tell them the men they were looking for had been there but had gone.

The police, noticing Michael O'Brien's nervous behavior, asked to search the home. When the police entered the vestibule, Michael O'Brien told them petitioners were inside with his family. The police began to run from the porch of the home; at that time one of the petitioners opened fire on the police.

The police officers began diving for cover just as police officers Spahr and Beranek drove up in a police car. Spahr and Beranek attempted to obtain cover, but both were shot and wounded.

A gun battle ensued, lasting about an hour. In all, five police officers received gunshot wounds. Tear gas was fired into the home, eventually causing petitioners to surrender. Some of the O'Briens left with petitioners from the back door where petitioners were arrested. The other O'Briens left from the front door. Two O'Briens were shot as they ran from the home.

Petitioners were taken to the East Cleveland police station where each made a confession. Petitioners Johnson and Fowler confessed both orally and in writing; petitioner Jordan confessed orally but refused to make a written confession. Subsequently, Asa Harris was arrested in Cincinnati; and he and petitioners were charged with thirty-three counts of aggravated burglary, aggravated robbery, kidnapping, attempted aggravated robbery, and attempted aggravated murder.

B.

Petitioners' version of what occurred on the night of May 29-30, 1974, as reflected in their testimony and the testimony of witnesses in their behalf, differed substantially from that of the state. Petitioners claimed that Schoolboy was a known drug pusher and that they were attempting to stop drug traffic in the community by convincing Schoolboy to convert to their Sunni Muslim religion and to give up his dealing in drugs. Denying that Asa Harris was with them on that evening, petitioners claimed that they went to the home of Judy Winegardner for the purpose of talking to Schoolboy about the Sunni Muslim faith and that Schoolboy was there alone. Schoolboy professed to accept their religion and flushed a bag of a white powder, which petitioners believed to be drugs, down the toilet. Schoolboy told petitioners that he had guns he wanted to dispose of, and petitioners agreed to take the guns to a community agency from which they would be turned over to the police. Petitioners and Schoolboy then went to Schoolboy's home on Euclid Avenue for the purpose of getting the guns.

After petitioners obtained the guns from Schoolboy, they went outside the Euclid Avenue home. Suddenly, Schoolboy pushed petitioner Fowler and ran toward a car with police officers in it which had come into the area. The police began shooting at petitioners who ran to the O'Brien home for refuge.

From this point to the time of their arrest, petitioners' story does not significantly differ from the state's version except that petitioners denied shooting first at the police who had come to the O'Brien home and, in fact, denied shooting at police officers at all, although petitioners Johnson and Jordan admitted discharging a weapon. Petitioners claimed that during and after their arrests they were physically abused by police officers, threatened, called names, denied access to counsel and coerced into waiving their rights to a preliminary hearing.

Petitioners claimed that they had been "set up" by Schoolboy and that police officers were part of his scheme. They also claimed that their actions at the O'Brien home were taken in self-defense.

After a lengthy trial, Asa Harris, whose defense was alibi, was acquitted of all charges. Petitioners, each of whom testified in his own behalf, were found guilty of the following charges: aggravated burglary of the homes of Andrew (Schoolboy) Jackson, Judy Winegardner and Catherine O'Brien; aggravated robbery of Andrew (Schoolboy) Jackson; and attempted aggravated murder of William Beranek and of Richard Spahr. Of some of the remaining charges, petitioners were acquitted by the jury. Of the other charges, the court dismissed one count for lack of evidence and later dismissed the rest when the jury could not reach a verdict on them.

II.
GROUNDS FOR RELIEF

A.
Involuntary Confessions

Petitioners' first ground for relief is:

> The state trial court violated [petitioners'] Fifth and Fourteenth amendment rights by admitting into evidence statements purportedly made by petitioner while in police custody, which were extracted by deception and physical and mental coercion.

A lengthy suppression hearing was conducted by the trial court at which numerous witnesses testified. Their testimony established that in the early morning hours after petitioners' arrest, oral statements were taken at the East Cleveland police department from each of the petitioners; and in addition, written statements were taken from petitioners Fowler and Johnson. The testimony of the police witnesses was diametrically opposed to that of

petitioners with respect to the issues of "deception and physical and mental coercion." The police officers who were involved in the arrest and interrogations of petitioners asserted that no physical abuse was inflicted on petitioners, that no threats were made, and that no deception was used in obtaining petitioners' statements. The police acknowledged that some force was used to subdue petitioners at the time of their arrest and once, in the case of petitioner Johnson, outside the police station, but maintained that petitioners' statements were freely and voluntarily given and were not the product of intimidation or coercion.

Petitioners, on the other hand, testified that they were repeatedly and brutally beaten by police officers and were subjected to verbal abuse, including threats and racial slurs. (Petitioners are black.) They claimed threats were made against their families and that a black police officer and white police officers alternated in the interrogation, using a "Mutt and Jeff" routine. They asserted that the combined effects of tear gas, physical abuse, hostility and threats left them no choice but to make statements to the police.

At the conclusion of the suppression hearing, the court ruled: ". . . I find the statements were voluntarily given and were not given because of threats, coercion and abuse." (Tr. 662)

The due process clause of the Fourteenth Amendment precludes the admission into evidence of a defendant's coerced confession. When the admissibility of a confession is challenged, the burden is on the state to prove by a preponderance of the evidence that the confession was freely and voluntarily given. *Lego v. Twomey*, 404 U.S. 477 (1972). Whether petitioners in this case were subjected to verbal and physical abuse and whether their confessions were the product of any such abuse, are factual issues that were fully and fairly litigated in the trial court at a hearing in which petitioners were represented by counsel. Therefore, under 28 U.S.C. Section 2254(d), the finding

of the state court that petitioners' confessions were not the product of abuse or coercion is presumed to be correct unless that "factual determination is not supported by the record."

As stated above, there was conflicting testimony about whether petitioners were subjected to physical and verbal abuse. Resolution of this issue was largely a matter of credibility. After hearing the testimony of the witnesses and looking at photographs taken of petitioners on the night of their arrest, the court found that petitioners' confessions were not coerced. This court, having considered as a whole that part of the record pertinent to the issue of coercion, finds the state court's determination is fairly supported by the record. Petitioners are therefore not entitled to relief on their first ground.

B.
Violations of Right to Counsel

As their second ground for relief, petitioners allege:

> The state trial court violated [petitioners'] Sixth and Fourteenth amendment rights by admitting into evidence statements made in the absence of counsel in instances where counsel had been requested but not provided, and in other instances which were critical stages of the accusational process.

Presumably, this ground for relief involves the five oral and written statements discussed in Part I above. Each petitioner in the trial court claimed that his statement or statements were obtained by custodial interrogation that continued despite his request for counsel.[1]

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[1]It is not clear whether petitioners are asserting in this court violations of their rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), since they do not cite the Fifth Amendment, which was the predicate for the *Miranda* decision. Inasmuch as a *Miranda* claim was made throughout the state proceedings and in light of respondent's assumption that *Miranda* claims are being asserted, this court will treat petitioners' second ground for relief as if it encompasses a claim under *Miranda*.

The trial court conducted a lengthy suppression hearing at which the admissibility of the statements now at issue was fully considered. The trial court ruled:

> I find that Defendant Fowler asked to see a lawyer before making a written statement. This being the case, his written statement will be suppressed.
>
> I find Defendant Jordan [*sic*] waived his right to a lawyer, that he did not request a lawyer prior to making his statement, and, therefore, his statement is admissible.
>
> I find the oral statement of defendant Johnson [*sic*] to be admissible, since he requested to see a lawyer only before making a written statement, and no such statement was ever made.
>
> Thus, for Defendant Fowler, the oral statement can be used. The written statement cannot be.
>
> For the Defendant Johnson, his written statement can be used, and for the Defendant Jordon [*sic*], his oral statement can be used.

(Tr. 662-663)

It is clear from the last paragraph quoted above and from the record that the trial court's first reference to defendant Jordan should have been a reference to defendant Johnson and vice versa. Petitioner Johnson did make a written statement, which was admitted into evidence, but petitioner Jordan did not. Therefore, this court will treat the trial court's initial reference to petitioner Jordan as relating to petitioner Johnson, and its initial reference to petitioner Johnson as relating to petitioner Jordan.

The trial court found as a matter of fact that petitioner Johnson "did not request a lawyer prior to making his statement" and therefore waived his right to a lawyer. This finding is supported by the record. Although petitioner Johnson testified that he was not advised of his constitutional rights and that he requested a lawyer prior to

making a statement (Tr. 141-42, 157), the police officers involved testified that Johnson was advised of his constitutional rights on more than one occasion and that Johnson indicated he understood those rights. (Tr. 71, 183, 220-21, 410, 412, 442) They further testified that Johnson did not ask to see a lawyer (Tr. 67, 76, 412, 444), and that he signed a "waiver of rights" form. Johnson's written statement is preceded by a written warning of constitutional rights and waiver form which petitioner Johnson signed. These circumstances support the trial court's finding that Johnson waived his rights under *Miranda*, and therefore his statements were admissible.

With respect to the statement of petitioner Fowler, there is support in the record for the trial court's implicit finding that petitioner Fowler was given complete *Miranda* warnings, including being informed of his right to counsel and being warned that anything he said could be used against him (Tr. 11, 290, 296, 387-88, 394). There was also testimony that petitioner Fowler stated he understood his rights (Tr. 11, 395) While petitioner Fowler testified that his request for an attorney was ignored and that his statements were the product of coercion and physical abuse, police officers testified, and the trial court found, that petitioner Fowler desired to have a lawyer present only in connection with the giving of a written statement. (Tr. 53, 290, 292, 294, 296, 297, 388, 389, 403). The trial court, therefore, suppressed petitioner Fowler's written statement since he did not, as he requested, consult with an attorney prior to making it, but it implicitly determined that petitioner Fowler knowingly and intelligently waived his right to a lawyer in connection with the giving of an oral statement.

A refusal to make a written statement without the assistance of counsel does not preclude a finding of waiver of the right to counsel in connection with the giving of an oral statement. *See United States v. Frazier*, 476 F. 2d 891 (D.C. Cir. 1973) (*en banc*). In this case, the testimony of police officers, credited by the trial court, indicated that petitioner Fowler told interrogating police

officers that he would talk to them but he wanted to contact his attorney before he put anything in writing. (Tr. 53, 290, 292, 296, 388, 389, 403) Several unsuccessful attempts to contact petitioner Fowler's attorney were made. (Tr. 52, 291, 294, 296, 387-388, 395) There was testimony that petitioner Fowler was told the interrogation would cease if he wanted to talk to a lawyer (Tr. 296-97), but petitioner Fowler stated "he only wanted to confer with an attorney for a written statement." (Tr. 389)

Petitioner Fowler did not testify that he did not understand the rights that were read to him or the implications of giving an oral, as opposed to a written statement. Indeed, his testimony at the suppression hearing (*see, e.g.*, Tr. 245) and at trial[2] indicates that he understood his rights. Under these circumstances, the trial court was justified in crediting the police officers' testimony that petitioner Fowler wanted to tell his side of the story to police but desired to talk to an attorney before "formalizing" his statements into a written document. Therefore, petitioner Fowler is not entitled to relief on this issue.

With respect to the statement of petitioner Jordan, there is support in the record for the trial court's implicit finding that he was fully advised of his constitutional rights. (Tr. 503, 532, 537, 575, 603) Indeed, petitioner Jordan himself testified that he was advised of his rights. (Tr. 105) There was also testimony that petitioner Jordan stated he understood his rights. (Tr. 537, 541, 577) The trial court found that petitioner Jordan, like petitioner Fowler, invoked his right to an attorney only with respect

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[2]During the cross-examination of petitioner Fowler, this exchange occurred:

Q: Having some college, you understood all your rights prior to the police telling you that.

A: Yes.

Q: So the police didn't really have to give you your rights? You knew what your rights were?

A: Oh, I knew what my rights were.

(Tr. 6688)

to a written statement, and implicitly found that petitioner Jordan knowingly and intelligently waived his rights with respect to an oral statement.

Although there is some testimony from which one might infer, as petitioner Jordan's trial counsel urged, that petitioner Jordan was misled about the admissibility into evidence of oral statements,[3] petitioner Jordan himself did not in his testimony corroborate this possible inference. He never testified that he was told oral statements were not admissible in evidence, nor did he testify that he did

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[3]Office Staimpel, the police officer who initially interrogated petitioner Jordan, testified:

Q: All right. I take it—I am assuming—that you explained to Charles Jordan that you were going to question him for the purpose of a statement which could be used against him in a court of law?

A: We explained to him that that was only to be an oral interrogation, and we explained the difference between an oral and written.

Q: What did you explain to him was the difference?

A: The difference was that if he made a written statement the statement would be reduced and signed by him, which in turn could be used as evidence in a court of law.

Q: All right.

A: And at this time he said that he would not make one until he could consult with a lawyer.

Q: Did you make any recitation of what an oral statement consisted of?

A: Yes, we explained to him what it was and he told us what happened.

Q: Now, was that the extent of the conversation with respect to an oral and written statement?

A: I believe so, Yes, sir.

Q: Now, when you got to this business about a written statement, Charles Jordan indicated he wanted to consult with a lawyer before he did something like that?

A: That's correct.

(Tr. 590-91)

not understand his rights. Indeed, from his testimony[4] and his self-professed steadfast refusal to make any statements, one can only infer that petitioner Jordan fully understood that what he said could be used against him.

Ironically, at trial Detective Copeland testified about petitioner Jordan's oral statement; but petitioner Jordan at the suppression hearing denied under oath ever making an oral statement to Detective Copeland. (Tr. 107, 117-18)[5] Thus, petitioner Jordan is now in the awkward position of arguing he was denied counsel in connection with the making of an oral statement he swore he did not make.[6]

In addition to petitioner Jordan's failure to corroborate any lack of understanding on his part, there was testimony that petitioner Jordan declined the opportunity to call an attorney (Tr. 559, 578), and that he believed it to be in his

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[4] Tr. 105:

Q: Okay. Now, the police officer came in and read your rights to you, is that right?

A: Right.

Q: Do you recall what he said?

A: You know—you have the right to be silent—and you know—the usual. I don't know it verbatim—but he said, "You have a right to an attorney and to be present during the questioning" and stuff of that nature.

[5] Officer Rosie also testified about petitioner Jordan's oral statement (Tr. 5014-18), but Officer Rosie heard this statement during Detective Copeland's interrogation of petitioner Jordan. (Tr. 501)

[6] The trial court also noted the apparent conflict between petitioner Jordan's testimony and the arguments advanced by his attorney. (Tr. 627)

interest to talk to police officers. (Tr. 46, 47).[7] Under these circumstances, the court concludes that the record justifies the trial court's determination that petitioner Jordan's invocation of his right to an attorney only with respect to a written statement was a knowing and voluntary choice.

Thus, the statements of each petitioner were properly admitted at trial. Petitioners are not entitled to relief on this ground.

C.
Confrontation With Jackson

As a third ground for relief, each petitioner asserts the following:

> It was prejudicial error and a violation of petitioner's Fifth, Sixth and Fourteenth amendment rights for the trial court to admit statements purportedly made by petitioner at a one-on-one confrontation at the police station when petitioner had not been advised of his constitutional rights and counsel was not present.

This ground for relief challenges the admissibility of oral statements made by petitioners to the police and to Schoolboy Jackson during one-on-one confrontations between each petitioner and Jackson. Because Jackson had been unable to identify any of the petitioners in a line-up, the police asked each petitioner if he objected to a one-on-one confrontation with Jackson to determine if he, petitioner, could identify Jackson. Detective Farmer,

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[7] Detective Copeland thus testified:

I was assigned to interview Mr. Jordan and Mr. Fowler, along with Cleveland. Mr. Jordan was interviewed, Mr. Jordan told us what happened; that he was caught coming out of the house, he couldn't do nothing else but tell us what happened.

* * * *

The men were caught coming out of the house. He just wanted to tell us why they did this, and that was it.

(Tr. 46, 47)

who conducted the confrontations, explained the purpose of the procedure as follows:

> Q: Now, will you tell us, sir, why you would take and single out these three individuals to take into that confrontation room, knowing that Mr. Jackson had not identified them?
>
> A: They had already told us they had robbed him the night before. I didn't know if they really robbed Mr. Jackson or not.

(Tr. 871) During the confrontations petitioners made incriminatory statements concerning the events that took place at the residences on Euclid and Fourth Avenues. At one point, Jackson asked petitioner Johnson if he was the person standing near the door at the Euclid Avenue home, to which Johnson answered, "Yes." (Tr. 907-08)

The trial court's ruling on the motions to suppress the statements made during the confrontations was as follows:

> The Court will deny the motion to suppress the evidence as to the confrontation. The question mainly dealt with was the procedure that was followed fair, and I find from the testimony the procedure was fair, and so the motion to suppress will be denied.

(Tr. 1007-08) It was, however, argued in the trial court that petitioners were entitled to counsel during the confrontation procedure.

With respect to petitioner Johnson, this court has accepted the trial court's finding that petitioner Johnson did not ask to speak to a lawyer prior to making statements to the police. *See* section II.B., *supra*. Although the record indicates that petitioner Johnson was not re-advised of his *Miranda* rights prior to the confrontation procedure, the procedure was essentially a continuation of the earlier interrogation, as to which petitioner Johnson had already waived his rights under *Miranda*. The information solicited was a rehash of what Johnson had already told the police,

except this time he identified Jackson by face as well as by name. Under these circumstances, assuming *arguendo* it was error to admit the statements of petitioner Johnson made during the confrontation, the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

Likewise, with respect to the statements of petitioners Jordan and Fowler made during the confrontation, they had already made full oral statements to the police that were properly admitted at trial. Any conceivable error in admitting statements obtained during the confrontation procedure was harmless beyond a reasonable doubt. Petitioners are not entitled to relief on this ground.

D.

Petitioners allege the following as their fourth ground for relief:

> [Petitioners'] Sixth and Fourteenth amendment rights were violated when the state used trickery and coercion to force [them] to relinquish [their] right to a preliminary hearing under Rule 5 of the Ohio Rules of Criminal Procedure.

Petitioners were taken for their initial appearance before Judge DeVinne of the East Cleveland Municipal Court. At that time Judge DeVinne advised petitioners of their constitutional rights, including their right to counsel. Each petitioner signed a form waiving his right to a preliminary hearing.

Petitioners claim that they were coerced into waiving their right to a preliminary hearing by the remarks of various police officers to the effect that petitioners would be better off if they waived their right to a hearing because they would get better food and care at the jail in Cleveland than they would get in East Cleveland. Petitioner Fowler also testified that he was told that the East Cleveland "night shift was fixing to come back on and they were still mad." (Tr. 6628)

Petitioner Fowler also claimed that there was an attorney at Judge DeVinne's chambers prior to the preliminary hearing. Petitioner Fowler testified that Lieutenant Jennrich of the East Cleveland police department told him that "[h]e [Officer Jennrich] knew that [petitioner Fowler] wouldn't want to talk to [the attorney] and he [Lieutenant Jennrich] sent him [the attorney] away. (Tr. 6791).[8]

Lieutenant Jennrich testified that he asked each petitioner whether he wanted an attorney at the preliminary hearing and that each petitioner stated he did not. He further testified that each petitioner told him that he wanted to waive his right to a preliminary hearing. Lieutenant Jennrich denied telling petitioners they would be better off by waiving the hearing because the facilities were better in Cleveland and because the East Cleveland police officers were angry with petitioners. (Tr. 5436-39)

The trial court made no express ruling on petitioners' claim that they had been coerced into waiving their right to a preliminary hearing. The reason for this lack of ruling is not entirely clear, but a reading of the transcript implies that the issue of the preliminary hearing was not raised as a separate matter in the trial court. It was apparently argued in connection with the claimed invalidity of one-on-one confrontations between each petitioner and Schoolboy Jackson. (See section II.c., *supra*.) The court of appeals, however, considered the issue now raised and held:

> Subsequent to the waiver of the preliminary hearing the Grand Jury returned true indictments against [petitioners]. The action of the Grand Jury negates the necessity of a preliminary hearing. (State ex rel. Hayes v. Powers (1969), 20 Ohio St. 2d 64)

For the purpose of ruling on this argument, the court will assume without deciding that petitioners' claims that they were coerced into waiving a preliminary hearing and were denied counsel in connection with their decision

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[8]There is no indication in the record that this attorney was in fact the lawyer for any of the petitioners.

to waive the hearing raise Sixth and Fourteenth Amendment issues under *Coleman v. Alabama*, 399 U.S. 1 (1970). The court will further assume without deciding that but for coercion by the police and lack of counsel, petitioners would not have waived a preliminary hearing. Nonetheless, the court concludes that the lack of a preliminary hearing, and necessarily of counsel's assistance in connection with it, was in this case harmless error.[9] The only indication of any prejudice to petitioners resulting from the lack of a preliminary hearing is found in the following statement of petitioner Johnson's trial counsel:

> Now, as the Court well knows, at that preliminary hearing the aspect of probable cause, the officer, or whoever is prosecuting the case to the Municipal Court, would then be asking Mr. Jackson: "Could you point to the man who kidnapped you, or who abducted you, or who robbed you?"
>
> And at a preliminary hearing, and at that time, he could not have identified anyone, and this matter would not have had a probable cause for a binding over, plus no million dollar bond, and all the rest.
>
> Counsel is suggesting, your Honor, that right at this time these detectives had decided that they were going to convince these men to avoid that confrontation where there was an open record that these men couldn't identify any of them, but to bypass that and to go through this procedure, that was ultimately followed in the Cleveland Police Station, where there was the identification—the line up—there was no identification, but then to have the one-on-one confrontation that followed.

(Tr. 946-47)

The court concludes that any prejudice along the lines raised by petitioner Johnson's trial counsel was harmless

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[9]The plurality in *Coleman* held that the failure to provide counsel at a preliminary hearing is not an automatic ground for reversal of a conviction; instead, a reviewing court must determine "whether the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California*, 386 U.S. 18 (1967)." 399 U.S. at 11.

beyond a reasonable doubt. First, the claimed harm relates only to the acts occurring at the Euclid Avenue and Fourth Avenue addresses; the charges relating to the events that occurred at the O'Brien home would clearly not have been affected by Jackson's failure to identify petitioners. Second, the mere fact that Jackson could not identify petitioners does not establish lack of probable cause to bind petitioners over to the grand jury. There was other evidence to link petitioners with the crimes alleged to have been committed at the Euclid Avenue and Fourth Avenue addresses, such as the personal property found in petitioner Fowler's car, the statements petitioners made to the O'Briens, and petitioners' confessions.

Third, it was brought out several times during the testimony of Schoolboy Jackson that he could not identify petitioners in a line-up or in one-on-one confrontations. Therefore, assuming a preliminary hearing would have been held and Schoolboy Jackson would have been asked whether he could identify petitioners, petitioners still suffered no prejudice because the same information that would have been elicited at the preliminary hearing was available and used at trial.

For the reasons stated, the court concludes that petitioners' fourth ground does not establish a basis for relief.

E.

Petitioners' fifth and sixth grounds for relief are related and will be considered together. The fifth ground is as follows:

> [Petitioners were] denied [their] Sixth and Fourteenth amendment rights to confrontation and due process when the trial court restricted [their] right to confront and to cross-examine the state's witnesses

> as to the existence of bias, prejudice, motivation and interest which might induce the witness to give false testimony.

The sixth ground is:

> [Petitioners were] denied [their] right to compulsory service of process in violation of the Sixth and Fourteenth amendments when the trial court refused to allow petitioner[s] to subpoena certain witnesses in [their] behalf.

The fifth ground for relief challenges the trial court's denial of petitioners' request to admit into evidence Schoolboy Jackson's income tax records and its limitation on petitioners' questioning of Schoolboy and of police officers about Schoolboy's involvement in drug dealing. The sixth ground challenges the trial court's refusal to issue subpoenae for several individuals who allegedly would have testified that they purchased drugs from Schoolboy. The sixth ground applies only to petitioner Jordan because his counsel alone requested the issuance of the subpoenae to which this ground relates.

With respect to ground five, the trial court ruled that the questions sought to be asked related only to the credibility of Schoolboy Jackson and that he would not permit "extraneous evidence" for the purpose of impeaching credibility. (Tr. 4033) With respect to the sixth ground, the trial court ruled that it would not issue subpoenae for witnesses whose testimony would attack Jackson's credibility.

The trial court stated that proof that Schoolboy was a drug dealer would not constitute a defense to the crimes charged. This statement is, of course, correct; whether Schoolboy was in fact a drug dealer was not itself a material issue in the case. But proof that Schoolboy was in fact a drug dealer was relevant to the material issue whether crimes in fact occurred at Schoolboy's Euclid Avenue and Fourth Avenue homes. Such proof would tend to corroborate petitioners' claim that Schoolboy

"set them up" in order to prevent them from interfering with his drug dealing. It would thus also tend to show that Schoolboy's testimony was the product of bias or prejudice.

Petitioners at trial argued that proof of Jackson's involvement with drugs went to the heart of their defense that Schoolboy "set them up," quite apart from its tendency to impeach his credibility by showing his bad moral character. On appeal they also relied upon the Supreme Court's decision in *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974), in which it noted that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."

In *Davis* the Court reversed the defendant's convictions for burglary and grand larceny because he was not permitted to cross-examine Green, a "crucial witness" for the prosecution, about his juvenile record, which indicated Green was on probation for burglary.[10] The Court found that because of the trial court's preclusion of inquiry into Green's juvenile record, the defendant "was unable to make a record from which to argue *why* Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial."[11]

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[10]The thrust of the defense was as follows:

From this petitioner [Davis] would seek to show—or at least argue—that Green acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation.

Id. at 311.

[11]The Court concluded:

On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-

This court concludes that *Davis* is distinguishable from the present case and that the trial court's limitation on evidence concerning Schoolboy's drug dealing, if error, was harmless. The court's analysis follows.

Of critical importance in *Davis* was the fact that "[t]he accuracy and truthfulness of Green's testimony were key elements in the State's case" against Davis, and that by prohibiting evidence about Green's status as a probationer for a juvenile offense, Davis was effectively precluded from establishing a factual basis for his argument that Green was biased.[12] By contrast, in this case the State of Ohio adduced considerable evidence other than the testimony of Schoolboy Jackson to prove that robberies and burglaries had been committed at the Euclid Avenue and Fourth Avenue addresses, thereby making Jackson's credibility less critical.

Moreover, facts were presented during trial to support petitioners' assertion that Jackson was biased because of his involvement with drug dealing. Several police officers were questioned about their knowledge of Schoolboy Jackson's involvement in drug trafficking, and there was detailed testimony about a police investigation of allegations that Jackson was involved in drug dealing. (Tr. 4685-88, 4720, 4763) There was also testimony about

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examination which " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis*, 384 U.S. 1, 3." *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

Id. at 318.

[12]As the Supreme Court stated:

> While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination.

415 U.S. at 318.

an arrest of Jackson at which barbiturates and cough syrup were found. (Tr. 6125) Petitioners themselves testified about Jackson's involvement with drug sales. Therefore, there was testimony before the jury linking Schoolboy Jackson with drug dealing.

Finally, as the trial court observed, Jackson's credibility generally had been "amply gone into and even unfairly impugned." (Tr. 2331-32) As the state appellate court held:

> A reading of the Jackson testimony on direct and cross-examination discloses he was permitted to answer questions regarding criminal convictions, army record and discharge, home life, marital status, association with other women, apartment income and expenses, store income and expenses, poolhall activities, prostitution, illegal drug possession and sale, income tax, gun registration, friends on the police force and finally the income and expenses of his friends.
>
> In summary Mr. Jackson was cross-examined extensively on every conceivable matter that may in some way be relevant to the case.

Therefore, although additional questioning concerning drug dealing may have corroborated petitioners' contention that Jackson was biased, it cannot be said that petitioners were denied the right of "*effective* cross-examination;" clearly, there was no danger of a perceived "speculative and baseless line of attack on an apparently blameless witness." 415 U.S. at 318.

Similarly, the trial court's limitation on the calling of additional witnesses did not result in an appreciable loss of substantiation of petitioners' claim that Schoolboy Jackson "set them up."[13]

---

[13]Furthermore, some of the evidence sought to be introduced could properly have been excluded on the ground of relevance even under petitioners' view of the case. For example, petitioners sought to obtain

For the reasons stated, the court concludes that the limitation on cross-examination and the calling of defense witnesses was not error. In any event, if error, it was harmless beyond a reasonable doubt. Petitioners are therefore not entitled to relief on their fifth and sixth grounds.

F.

Petitioners' seventh ground for relief is:

> The evidence adduced at trial was not sufficient, as a matter of law, to support the verdict of guilty of attempted aggravated murder, and therefore, violated [petitioners'] rights under the Fourteenth Amendment of the United States Constitution.

The state appellate court considered the same issue and concluded:

> There was testimony that the appellants initiated the shooting and shot Ptl. Beranek and Sgt. Spahr. The jury had sufficient evidence before it to find that the appellants attempted to kill the policemen.

The Supreme Court of the United States recently adopted a new standard for reviewing the sufficiency of the evidence in a proceeding under 28 U.S.C. Section 2254. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court, rejecting the "no evidence" test of *Thompson v. Louisville*, 362 U.S. 199 (1960), held that

> in a challenge to a state criminal conviction brought under 28 U.S.C. Section 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to

---

and introduce Jackson's income tax returns to show that he was living beyond his means. The link between overspending one's reported income and being a drug pusher, however, is tenuous at best

> habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

443 U.S. at 324 (fn. omitted). The *Jackson v. Virginia* test "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n. 16.[14]

Petitioners argued in the state courts, and presumably argue in this court, that the State of Ohio failed to prove beyond a reasonable doubt that Officers Beranek and Spahr were shot by petitioners, rather than by other police officers. Petitioners pointed to the following circumstances to support that contention: (1) police officers were firing toward the O'Brien home, and apparently shot two of the O'Briens as they were leaving their home; (2) no ballistic evidence linked the wounds received by police officers with the weapons fired by petitioners; (3) no police officers testified that petitioners shot them.[15]

Applying the standard of *Jackson v. Virginia*, the record in this case, it cannot be said that "no rational trier of fact could have found proof of guilt [of attempted aggravated murder] beyond a reasonable doubt." Officers Beranek and Spahr testified that they arrived at the O'Brien home

---

[14]Petitioners were charged with attempted aggravated murder of Patrolman William Beranek and Sergeant Richard Spahr in violation of Ohio Rev. Code Sections 2903.01 and 2923.02. Specifically, it was alleged that petitioners "unlawfully and purposely did attempt to cause the death of Ptl. William Beranek [and of Sgt. Richard S. Spahr] while committing Kidnapping and/or Aggravated Burglary and/or Aggravated Robbery."

[15]Even if it were possible that Officers Beranek and Spahr were shot by fellow officers, it was not necessary for the state to prove that petitioners actually shot anyone in order to convict them of attempted aggravated murder. Merely shooting *at* someone with purpose to kill and in the course of committing the crimes of kidnapping and/or aggravated burglary and/or aggravated robbery would sustain a conviction for attempted aggravated murder.

just as other police officers were talking to Michael O'Brien. A very short time later, the shooting started. Officer Spahr was shot almost immediately; he testified that thirty seconds elapsed between the time he heard the first shots and the time he was shot. The bullet that wounded him came through the windshield head-high. Officer Spahr testified that he observed gunfire coming from the second floor of the O'Brien home. (Tr. 5638-40) From this testimony alone, even aside from the corroborating testimony of other witnesses, a rational jury could find beyond a reasonable doubt that Officer Spahr was shot before police officers had time to return petitioners' gunfire, and by someone shooting down at the police car from above.

Similarly, there was testimony from which a rational jury could find beyond a reasonable doubt that Officer Beranek was shot by petitioners and not by other police officers. Officer Beranek testified that he was crouched behind the left rear fender of a car parked behind their police vehicle, and was facing the O'Brien home. He said he was shot in the left shoulder "from the top." (Tr. 5731-32) He also testified that the bullet that hit him passed through the car behind which he was taking cover. (Tr. 5743) While he stated that he could hear sporadic gunfire of police into the O'Brien home (Tr. 5768), he testified that he was certain the shot that hit him came from the O'Brien's house. (Tr. 5755)

From this testimony a rational jury could have found beyond a reasonable doubt that Officer Beranek was shot by gunfire coming from the home of Catherine O'Brien. While it is possible to postulate other explanations of what occurred, the evidence, taken as a whole and viewed most favorably to the state, amply supports petitioners' convictions of attempted aggravated murder of Officers Beranek and Spahr.

Therefore, petitioners' seventh ground for relief is not well taken.

F.

Petitioners' eighth and final ground for relief is as follows:

> The trial court violated [petitioners'] rights under the Fifth, Sixth and Fourteenth amendments of the United States Constitution when it denied [petitioners'] motion for separate trials.

This ground is premised on alleged violations of petitioners' rights under *Bruton v. United States*, 391 U.S. 123 (1968), arising from the introduction into evidence of petitioners' confessions, each of which implicated the other two petitioners.

The short answer to petitioners' contention is that *Bruton* applies only when the confessing co-defendant, whose confession implicates the other defendant or defendants, does not take the stand at the joint trial and is therefore not subject to cross-examination. *See id.* at 137; *Harrington v. California*, 395 U.S. 250 (1969). In this case, each petitioner took the stand and was fully subject to cross-examination by counsel for the other petitioners. Moreover, each petitioner's confession was properly admitted at trial; under *Parker v. Randolph*, 442 U.S. 62 (1979), no confrontation clause issue is therefore raised. For these reasons, petitioners were not denied their right of confrontation under the Sixth and Fourteenth Amendments.

III.

For all the reasons stated above, petitioners are not entitled to relief on any of the eight grounds they raise. Therefore, their petitions for a writ of habeas corpus are denied.

IT IS SO ORDERED.

U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CRAIG FOWLER,
CHARLES JORDAN,
LARRY JOHNSON
Petitioners

v.

A. R. JAGO
Respondent

C79-64, C79-65, C79-66

ORDER

FILED July 10, 1980

THOMAS, J.

The court having considered petitioners' grounds for alteration or amendment of this court's memorandum and order of June 16, 1980 and finding them to be without merit, their motion to alter or amend is hereby denied.

IT IS SO ORDERED.

/s/ signature deleted
U.S. DISTRICT JUDGE

NO. 80-3583

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CRAIG FOWLER, CHARLES JORDAN
and LARRY JOHNSON'
Petitioners–Appellants,

v.

A.R. JAGO, Superintendent,
Respondent–Appellee.

ORDER

FILED October 7, 1982

BEFORE: EDWARDS, Chief Judge, ENGEL, Circuit Judge, and Gilmore, District Judge*

In this matter, a petition for rehearing en banc was filed and denied by the Court;

And the petition for rehearing having been referred to this panel for consideration;

And it appearing that nothing has been raised by the petition for rehearing that was not considered in the original disposition by this Court;

IT IS HEREBY ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Clerk, signature deleted

---

*Hon. Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 80-3583

CRAIG FOWLER, CHARLES JORDAN & LARRY JOHNSON,
Petitioners–Appellants,

vs.

A.R. JAGO, SUPERINTENDENT,
Respondent–Appellee.

FILED October 26, 1982

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 34287

STATE OF OHIO
Appellee

v.

LARRY JOHNSON, CRAIG FOWLER
CHARLES JORDAN
Appellants

DATE December 11, 1975

APPEAL FROM COMMON PLEAS COURT (Criminal)
No. 14174

JOURNAL ENTRY

FILED March 18, 1976

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This cause is in this court on appeal from the Common Pleas Court of Cuyahoga County of a jury verdict of guilty to the crimes of three counts of aggravated burglary under Ohio Revised Code Section 2911.11, aggravated robbery under Section 2911.01, and two counts of attempted aggravated murder under Section 2923.02.

The jury found the appellants not guilty of nine counts of kidnapping under Section 2905.01, two counts of aggravated robbery under Section 2911.01, one count of attempted aggravated robbery under Section 2923.02, and two counts of attempted aggravated murder under Section 2923.02. The jury was unable to reach a decision on nine counts of kidnapping and one count of attempted aggravated murder, and the trial court dismissed one count of attempted aggravated robbery and one count of attempted aggravated murder.

A fourth defendant, Asa Harris, who relied on an alibi defense, was acquitted of all charges.

The facts are complicated and in considerable dispute. However, it is appellee's contention that the appellants broke into the house of Judy Winegardner at 13615 Fourth Street, East Cleveland and robbed Andrew "Schoolboy" Jackson and Judy Winegardner, burglarized the home, bound and gagged members of the family. Appellants forced Jackson to go with them to Jackson's house at 13736 Euclid Ave., East Cleveland where they broke into the house and burglarized the house.

A resident, Joyce Cray, on the third floor, telephoned police. The gunmen ran to the O'Brien house on Mt. Union in East Cleveland and broke in the back door and kept the O'Briens hostage.

The police in a door to door search determined the appellants were in the O'Brien house and at that moment were fired upon by the appellants. Police officers Spahr and Beranek were wounded as they attempted to exit their vehicle. After a 45 minute gun battle the appellants surrendered.

Appellants version is that "Schoolboy" Jackson was selling drugs to high school students. They were members of the Sunni Muslim faith and opposed the use

of drugs and alcohol. They went to Jackson's house at 13615 Fourth St. to persuade him to discontinue passing out drugs. From there Jackson voluntarily took them to 13736 Euclid Ave. to get rid of some guns. Jackson suddenly ran from the house and appellants sought shelter from police bullets at the O'Brien house.

The appellants have presented the following questions for appeal:

> "1. The oral and written statements made by the appellants while in the custody of the East Cleveland Police Department were extracted by both physical and mental coercion in violation of the Fifth and Fourteenth Amendments and were erroneously admitted into evidence.
>
> "2. The admission into evidence of the statements made by appellants, while in the custody of the police, which were not made as the result of a valid waiver of their right to remain silent, and in absence of counsel violated the Sixth and Fourteenth Amendments to the United States Constitution.
>
> "3. As a result of coercion, and without the assistance of counsel, the appellants relinquished their right to a preliminary hearing under Rule 5 of the Ohio Rules of Criminal Procedure in violation of their Sixth and Fourteenth Amendment rights.
>
> "4. The absence of counsel at the time of the relinquishment of the right to a preliminary hearing invalidates the convic-

tion as a violation of the appellants' Sixth and Fourteenth Amendment rights.

"5. During the lineup at the Cleveland Police Station the appellants were denied the right to counsel in violation of their Sixth and Fourteenth Amendment rights.

"6. The statements made by appellants at the one-on-one confrontation at the Cleveland Police Station and the resulting identifications, were obtained in violation of the appellants' Fifth, Sixth and Fourteenth Amendment rights.

"7. The denial of a transcript at state expense of the pretrial motion hearing violated the Sixth and Fourteenth Amendments to the United States Constitution.

"8. The appellants were denied the right to confront and cross-examine the State's witnesses as to the existence of motivation and interests contrary to those of the appellants, bias, and prejudice in violation of the Sixth and Fourteenth Amendments and the Ohio Constitution.

"9. The appellants were denied their rights to compulsory service of process in violation of the Sixth and Fourteenth Amendments.

"10. The trial court erred when it denied appellants' motion for separate trials in violation of the Sixth and Fourteenth Amendments to the Constitution and Rule 8 of the Ohio Rules of Criminal Procedure.

"11. The jury lacked sufficient evidence upon which it could convict appellants of attempted aggravated murder.

"12. The appellants have been denied their Sixth and Fourteenth Amendment rights to a fair trial."

We will now consider the assignments of error in the order in which they are listed.

In regards to the first and second assignments of error, there is a disparity between the testimony of the appellants and the police officers. The officers testified the appellants had not been physically abused. The photographs of the appellants do not demonstrate they had been beaten as the injuries were minor and insignificant.

The officers testified the written and oral statements were voluntary and that the appellants had been given their rights on more than one occasion.

The first and second assignments of error lack merit.

As to the third and fourth assignments of error the appellants were taken to the East Cleveland Municipal Court and there waived their right to a preliminary hearing. The appellants do not have a record of the arraignment in East Cleveland Municipal Court and the appellants do not argue that Judge DeVinne failed to fully give them their rights including the right to be represented by counsel.

Appellants contention is intimidation. They claim they were told that if they did not waive the preliminary hearing they would be returned to the East Cleveland City Jail where the officers would be angry. Certainly

the appellants had full opportunity to inform Judge DeVinne of their apprehension if any in fact existed.

Subsequent to the waiver of the preliminary hearing the Grand Jury returned true indictments against the appellants. The action of the Grand Jury negates the necessity of a preliminary hearing. (State ex rel. Haynes v. Powers (1969), 20 Ohio St.2d 64)

The third and fourth assignments of error lack merit.

Assignments of error five and six concern the lineup and one-on-one confrontation. The appellants were informed of their right to have counsel present. They waived this right and further agreed to the one-on-one confrontation with Jackson. Therefore assignments of error five and six are overruled.

As to assignment of error seven the appellants were entitled to a transcript at state expense. However, since the appellants secured this transcript at their own expense the error was harmless.

The eighth assignment of error concerns appellants claim that the court did not permit the cross-examination of Mr. Jackson concerning his criminal activity. A reading of the Jackson testimony on direct and cross-examination discloses he was permitted to answer questions regarding criminal convictions, army record and discharge, home life, marital status, association with other women, apartment income and expenses, store income and expenses, poolhall activities, prostitution, illegal drug possession and sale, income tax, gun registration, friends on the police force and finally the income and expenses of his friends.

In summary Mr. Jackson was cross-examined extensively on every conceivable matter that may in some way be relevant to the case.

Appellants' eighth assignment of error is without merit.

Appellants' ninth assignment of error is that the court denied compulsory process to obtain witnesses to testify for the defense. These witnesses would have testified according to appellants that Jackson illegally sold them narcotics. However, the appellants did not proffer in the record what the testimony of the witnesses would have been.

The court's ruling was that since these witnesse's testimony related to Jackson's credibility he would not order compulsory process. The court succinctly stated that if it was true Jackson sold drugs would this give appellants the right to rob him? Obviously not.

The ninth assignment of error lacks merit.

Considering the tenth assignment of error which is that the appellants should have had separate trials since they had given written and oral statements. Our understanding of Bruton v. United States, 391 U.S. 123 (1968) is that is applies only when a statement of a co-defendant incriminates another co-defendant and the declarant does not testify. In the instant case all the defendants testified and were subject to cross-examination.

The specific holding of the court in *Bruton* was:

> "Plainly, the introduction of (the co-defendant's) confession added substantial, perhaps even critical weight to the Government's case in a form not subject to cross-examination, since (the co-defendant) did

> not take the stand. Petitioner thus was denied his constitutional right of confrontation."

We also cite Wyatt v. State of Oklahoma, 385 F. Supp. 562 (1974) wherein the court stated:

> "If for any reason there was error under these circumstances in receiving Davis's statements it was harmless beyond a reasonable doubt. The mere fact that the *Bruton* rule may have been violated does not automatically require reversal of the ensuing criminal conviction. As stated by the Court in *Bruton:* 'A defendant is entitled to a fair trial but not a perfect one.' 391 U.S. at 135, 88 S. Ct. at 1027. In this case the properly admitted evidence of guilt is overwhelming and the prejudicial effect of the co-defendant-s statement is insignificant by comparison."

For the above reason *Bruton* is of no avail to appellants and the tenth assignment of error is overruled.

Appellants' eleventh and twelfth assignments of error was that the jury lacked sufficient evidence to convict of attempted aggravated murder and that they were denied a fair trial.

There was testimony that the appellants initiated the shooting and shot Ptl. Beranek and Sgt. Spahr. The jury has sufficient evidence before it to find that the appellants attempted to kill the policemen.

The transcript discloses considerable patience on the part of Judge Nahra, the trial judge, that defense counsel were competent attorneys, and the trial was in every respect fair.

The last two assignments of error are without merit.

Judgment affirmed.

RECEIVED FOR FILING DEC 11, 1975
/s/ signature deleted

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Robert E. Cook, P.J.
Alfred E. Dahling, J.
Joseph Donofrio, J., concur

/s/ Robert E. Cook
PRESIDING JUDGE

(Cook, P.J. & Dahling, J., from 11th Appellate District and Donofrio, J., from 7th Appellate District, sitting by assignment in the 8th District Court of Appeals)

N.B. This entry is made purusant to the third sentance of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decison, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

Counsel for Appellee: John T. Corrigan
Counsel for Appellant: Floyd Oliver

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *1976 TERM*

City of Columbus. *To wit: May 13, 1976*

State of Ohio,
Appellee,

vs.

Craig Fowler et al.,
Appellants.

No. 76-66

APPEAL FROM THE COURT OF APPEALS

for CUYAHOGA County

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CUYAHOGA County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19
Clerk
Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1976 TERM*

City of Columbus. *To wit: May 13, 1976*

State of Ohio,
Appellee,

vs.

Craig Fowler et al.,
Appellants.

No. 76-66

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for CUYAHOGA County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20,00, paid by Affidavit of Poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19
Clerk
Deputy

Filed April 18, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CRAIG FOWLER,
CHARLES JORDAN,
LARRY JOHNSON,
Petitioners,

v.

A. R. JAGO, SUPT.,
Respondent.

Nos. C79-64, C79-65, C79-66

JUDGE THOMAS

MOTION FOR ORDER REQUIRING
PRODUCTION OF THE TRANSCRIPT
PURSUANT TO RULE 5

Now comes the Petitioners, by and through their undersigned counsel, and, pursuant to Rule 5 of the Rules Governing Section 2254 cases, respectfully request that this Court issue an order as specified at page 15 of the "Return" of the Respondent, to require the original transcript currently in possession of the Ohio Court of Appeals to be filed with the District Court.

Respectfully submitted,

/s/ signature deleted
RICHARD L. AYNES

Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, (216) 375-7334, Counsel for Petitioners

MEMORANDUM IN SUPPORT OF MOTION

The Petitioner and Respondent are in agreement that no evidentiary hearing is necessary in this case to review the claims currently presented to the Court. However, the production of the original trial transcript is necessary for a resolution of the claims. Respondent's counsel has indicated at page 15 of his Return that he stands ready to produce the original transcript to be deposited in this Court. However, Respondent's counsel indicates that in order to accomplish this task it is necessary for this Court to issue an order requiring that such a transfer be made. Because Petitioner believes that reference to the transcript will be necessary to resolve these claims, he would join with Respondent in requesting that such an order be issued so that the transcript may be deposited with the court. This request is made pursuant to Rule 5 of the Rules Governing Section 2254 cases which provides in relevant part:

> "The Court on its own motion or upon request of the Petitioner may order that further portions of existing transcripts be furnished. . . "

Further, Petitioner notes that prior to the adoption of the Rules Governing Section 2254 cases, it was customary for Petitioner to file a "Traverse" in response to the filing of the "Respondent's Return." However, since Rule 5 apparently officially abolished "returns" and substituted in lieu thereof answers and since no provision is made for a filing of a Traverse, it is Petitioner's understanding that he is neither required nor entitled to file such a document. Consequently, in light of the applicability of the Rules of Federal Civil Procedure, it is Petitioner's intent to file a Motion for Summary Judgment within a reasonable time after the filing of the original transcript with this Court.

Respectfully submitted,

/s/ signature deleted
RICHARD L. AYNES
Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, (216) 375-7334, Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Motion was sent by regular U.S. mail to Mr. Simon B. Karas, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, on this 11th day of April, 1979.

/s/ signature deleted
RICHARD L. AYNES
Counsel for Petitioners

State of Ohio v. Craig Fowler, et al.
No. CR14174, CCP/Cuyahoga

[Tr. 662]

WEDNESDAY AFTERNOON SESSION,
AUGUST 21, 1974

THE COURT: With respect to the motion to supress the statements, I find the statements were voluntarily given and were not given because of threats, coercion and abuse.

The only question is, whether a lawyer was requested prior to any statement.

I find that Defendant Fowler asked to see a lawyer before making a written statement. This being the case, his written statement will be suppressed.

I find Defendant Jordon waived his right to a lawyer, that he did not request a lawyer prior to making his statement and therefore, his statement is admissible.

I find the oral statement of Defendant Johnson to be admissible, since he requested to see a lawyer only before making a written statement, and no such statement was ever made.

Thus, for Defendant Fowler, the oral statement can be used. The written

[Tr. 663]

statement cannot be.

For the Defendant Johnson, his written statement can be used, and for the Defendant Jordon, his oral statement can be used.

We will hear now the motion to suppress the evidence seized in the Defendant Fowler's car.

Are you prepared to proceed, Mr. Marino?

MR. MARINO: Yes, your Honor. I do have a witness here, Detective Stimpson.

ORIGINAL

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SUPREME COURT, U.S.

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,

Petitioner,

vs.

CRAIG FOWLER,
CHARLES JORDAN,
and
LARRY JOHNSON,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Richard L. Aynes,
Counsel of Record

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Attorney for Respondents

QUESTION PRESENTED

I. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT THE RECORD IS SUCH THAT THE PRIMARY FACTS UNDERLYING THE LEGAL CONCLUSION REACHED BY A STATE COURT TRIAL JUDGE COULD NOT BE RECONSTRUCTED UNDER LaVALLEE V. DELLE ROSE, S. 410 U.S. 690 (1973) IS CORRECT.

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PARTIES

When the habeas corpus petition below was initially filed, Respondents Fowler, Jordan, and Johnson were confined in the Southern Ohio Correctional Facility (S.O.C.F.), of which Mr. A. R. Jago was Superintendent. In this petition for Writ of Certiorari, Mr. R. C. Marshall, Mr. Jago's successor as Superintendent at S.O.C.F., is named as the Petitioner.

However, none of the Respondents is currently confined in S.O.C.F. Rather, Mr. Fowler is currently being held at the London Correctional Facility, where the Superintendent is A. R. Jago. Messrs. Johnson and Jordan are currently held at the Marion Correctional Facility, where the Superintendent is E. P. Perini. Consequently, the caption in the present case should be denominated: A. R. Jago, Superintendent, and E. P. Perini, Superintendent, Petitioners, vs. Craig Fowler, Charles Jordan, and Larry Johnson, Respondents.

The Respondents, in order to avoid confusion, have utilized the same caption that was used in the initial Certiorari Petition.

PRELIMINARY SUMMARY

Petitioner, recognizing that this Court is not merely a forum for the correction of errors, protests, as he must, that he is not simply a "disaffected litigant" [Petition for Writ of Certiorari at 11-12]. In support of that claim, he criticizes the good faith of the majority below and attempts to present a picture of the United States Court of Appeals for the Sixth Circuit as an errant Court unwilling to follow precedent. In attempting to make that case so as to bring himself within the category of cases deemed appropriate for consideration for potential review by this Court, he cites two other cases from the same Circuit which he maintains confirms his view. Clark v. Jago, 676 F. 2d 1099 (6th Cir. 1982) (cert. pending); Lonberger v. Jago, 635 F. 2d 1189 (6th Cir. 1980), vacated ___ U.S. ___ 68 L. Ed. 2d 290 (1981), opinion after remand, 651 F. 2d 447 (6th Cir. 1981), cert. granted ___ U.S. ___, 71 L. Ed. 2d 292 (1982). An examination of those cases reveal that they both are habeas corpus proceedings which arose from underlying convictions within the State of Ohio and in which the Ohio Attorney General's Office is counsel. As such, they simply demonstrate that he has been thrice "disaffected."

Respondents Fowler, Johnson and Jordan submit that if, as they maintain, the Sixth Circuit has been faithful to the dictates of this Court, then there is no reason for certiorari to be granted. If, on the other hand, the Court below in some manner erred, then this Court can make the proper institutional response when it renders its decision in Lonberger v. Jago, supra. Under either possibility, certiorari is not warranted.

Perhaps the strongest indication of that fact--outside one's independent review of the record--is the action of Judge Engle below who dissented and would have sustained the position of the Petitioner. Though Judge Engle obviously thought the majority was incorrect in its resolution of the issue before it and felt strongly enough to author a dissent for publication, when the

time came to vote for rehearing and rehearing en banc, neither he nor any other Judge on the Sixth Circuit deemed the case of such institutional importance as to justify the time and attention of the Circuit Court for en banc review. If that assessment is correct--and Respondents, while acknowledging that the present case is obviously of paramount importance to them personally, submit that it is--then it should apply a fortiori to the decision of this Court with respect to the appropriateness of certiorari.

STATEMENT OF THE CASE

The major procedural events from the time of conviction to the initiation of proceedings in this Court are set forth in the Petition for Writ of Certiorari at pages 8-10. While Respondents would characterize certain of those proceedings in a somewhat different manner, for purposes of this proceeding, a sufficient basis for understanding the general nature of the proceedings below has been provided. However, there are certain procedural matters which bear emphasis.

First. Petitioner incorporates the fact that eight years have now passed since the initial trial of these Respondents into his argument and "Question Presented." That fact should have no bearing upon the case at bar for two separate reasons. Initially, provision is made under Rule 9(a) of the Rules Governing Section 2254 Petitions to protect the State against unwarranted prejudice due to delay. The Petitioner has neither alleged that he is the subject of any such prejudice nor attempted to invoke the provisions of Rule 9(a).

Further, an examination of the record will reveal that much of the delay in the case at bar is directly attributable to the State. For example, the fact that the State charged each of these defendants with thirty-three (33) separate counts and secured convictions upon only six (6) charges would seem to support at least a prima facie case of over-charging by the State.

This, in turn, resulted in unnecessarily extending the trial proceedings which, in turn, because of the voluminous record, resulted in further delay at every step of the appellate/habeas proceedings.

Similarly, an examination of the record in the habeas corpus proceedings will reveal that these Respondents (then the habeas corpus Petitioners), made every attempt in both the District Court and the United States Court of Appeals to have the state trial court transcript actually physically deposited with the Court. The Petitioner (then Respondent) successfully resisted this action until May 5, 1982, some twenty days after the oral argument, when the Sixth Circuit ordered that the transcript be deposited with the Court. It is a matter of record that it was not until July 7, 1982--some two months later--that the order was complied with.

These examples are merely illustrative. The point is that much of the delay was occasioned by the State of Ohio. Having caused that delay, it cannot equitably be allowed to use that same delay as an excuse to deny Messrs. Fowler, Johnson and Jordan their constitutional rights.

Second. The Petitioner thinks it significant that Respondents did not seek an evidentiary hearing in the District Court below. Though there was perhaps no "stipulation" as that word is generally utilized, Petitioner is correct when he indicates that in a pleading filed with the District Court, counsel for Respondents indicated that an evidentiary hearing was unnecessary (A-74). However, Respondents' position with respect to the need for an evidentiary hearing was not predicated upon any theory of adequate fact-finding by the state trial court. To the contrary, Respondents maintained that they were entitled to judgment even without an evidentiary hearing. This view is supported by consideration of the fact that the issue of voluntariness is not simply a question of fact but rather a mixed question of law and fact upon which the Federal Court has

a duty to make an independent assessment of the record and reach an independent legal conclusion. E.g., Mincey v. Arizona, 437 U.S. 385, 398 (1978).

Respondents submit that the determination of whether an evidentiary hearing is necessary should be analogized to a ratchet: if the record demonstrates--as Respondents think it does here--that the habeas corpus Petitioners are entitled to relief, then it should be granted without a hearing. If, however, the record does not demonstrate that relief is required, then the Petitioners must be given an opportunity for a hearing in which evidence in support of their claims can be offered.

In the case at bar, the Court of Appeals took a third approach. Without expressing any opinion as to the result which would be obtained if a decision were made upon the present record, the Court directed that an evidentiary hearing be held. While this course of action is certainly not as satisfactory to the Respondents as if the Court had granted them judgment, they nevertheless do not deny the power of the Circuit Court to direct that such a hearing be conducted.

Third. In the Sixth Circuit, Messrs. Fowler, Johnson and Jordan raised seven issues for appeal. The Circuit Court, finding the voluntariness issue "dispositive", did not rule upon the other six claims. Slip Opinion at 4 (A-4).

STATEMENT OF THE FACTS

Given the length and complexity of the trial with its rich variety of facts, it is predictable that no statement of the facts designed to be short enough to be encompassed in a certiorari petition would meet with the approval of one who views it with a critical eye.[1/] This is all the more

---

1/ This case was reputed to be the longest trial in the history of Cuyahoga County, Ohio. The record consists of over 160 Exhibits and a trial transcript of eight thousand, three hundred and thirty-four (8,334) pages.

true because the very bulk and length of the record makes it impossible for counsel to review the entire record prior to certiorari proceedings and requires that factual representations be based upon recollection, notes, transcript summaries and spot checks of the record.

While acknowledging that Petitioner's recitation of the facts set forth the general outline of the events testified to at trial, Respondents nevertheless submit that a detailed examination of the record would produce a markedly different interpretation of the record and fully reserves the right to make a more detailed presentation of the actual status of the facts contained in the record at any future proceeding.

An example of such disagreement is found in Petitioner's statement that in the "confusion" when the O'Brien family and these Respondents left the O'Brien home, two of the O'Briens were shot (Certiorari Petition at 6). This raises the image that firing was going on and the O'Briens inadvertently stepped into the line of fire when trying to leave the home; or that there was some type of melee in which the victims were accidently shot. However, the record demonstrates a completely different factual situation.

When the individuals left the house they left in two groups, with some coming out the front door and some leaving by the rear door. All <u>three</u> Respondents left by the rear door and were in custody of the police at the time of the shooting. Though some of the family left by the back door with these Respondents, six of the family came out the front door (T. 3392). It is important to emphasize that there was <u>no</u> shooting going on at the time they came through the front door (T. 3278-79). Moreover, the shooting that took place was not indiscriminate. Though six individuals left the house by the front door, only two were shot. <u>Both</u> of those were males who held their hands in the air as if they were surrendering. Dennis O'Brien was shot in the

back four times and John O'Brien was shot in the back five times (T. 3243; 3393). The only conclusion that can be fairly drawn from this testimony is that someone, believing these two O'Brien family members to have been the Respondents, deliberately attempted to assassinate them in what the assassin thought was their attempt to surrender. All testimony produced at the trial intimated only police officers as the persons who did this shooting. Indeed, Dennis O'Brien testified: "Yes, the police shot me, that is a fact" (T. 3249). Thus, the only "confusion" that occurred was that the police assassin(s) confused his/her victims.

As significant as these facts are in and of themselves, they have even greater import to the case at bar where the truthfulness of the Respondents' allegations that the police tried to kill them are at issue and the voluntariness of purported statements is called into question. Initially, the fact that some police officer(s) did attempt to kill individuals thought to be these Respondents, corroborates their own testimony that a prior attempt had been made to kill them and indicates that their fear both for their lives at that time and at the time that they attempted to surrender was not based upon fantasy or speculation, but rather was well-founded.

Second, and equally as important, the shooting of the O'Briens bears a direct relation upon the apprehension and fear of the Respondents when confronted with police officers insisting that they make statements which the police officers would accept as being "true". The O'Briens served as an object lesson (the second one, if the court credits Respondents' account that Detective Copeland had previously attempted to assassinate them) that the police were capable of resorting to violence even to the point of attempting to take someone's life, if they were angered. This object lesson constituted coercion to the maximum extent. It makes little difference whether the police actually pointed a gun at the Respondents' head, or

simply insisted that they give them an "acceptable" version of the incident with full knowledge of the capability of violence in their minds. It is factual matters such as this which demonstrate the unconstitutionality of the police conduct and support the decision of the Court of Appeals below.

In order to attempt to overcome the considered opinion of the majority of the Sixth Circuit Court of Appeals, Petitioner also seeks to invoke a presumption of "regularity" of the proceedings in the state courts below. While this may have some superficial appeal, it is hardly warranted at the case at bar. For example, at the time of these Respondents' trial, the Ohio statutes very clearly indicated that a trial judge could sentence defendants to a maximum/minimum of only 15 years. See R.C. 2929.41. Nevertheless, the trial judge purported to sentence these defendants to 28 to 100 years. Though that sentence was later corrected, the fact that such an "error" (if it was an error) was made should not be ignored. On the one hand, if the trial court was unable to comprehend the meaning of a relatively clear statute, then what expectations can one have that the trial court understood the more sophisticated claims of federal constitutional law with respect to the voluntariness issue here? On the other hand, if the trial court did understand the commands of R.C. 2929.41 and intentionally violated the provisions of that statute--for whatever reason--then what basis is there for presuming regularity?

By the same token, little comfort can be taken by the review that occurred in the state court of appeals. At the time of the state's appeal, the Eighth District Court of Appeals is reputed to have been one of the best appellate benches in the State of Ohio and, indeed, compared favorably with any other intermediate appellate court in the nation. However, much to the regret of these Respondents, none of the regular judges of that court sat on the three-judge panel which heard this case. Rather, three

visiting judges unfamiliar with the history of police and prosecution abuse of minorities within Cuyahoga County--were assigned to hear the case. Even though 13 assignments of error were advanced, the court disposed of those errors in relatively cursory fashion in an opinion that was less than 15 pages (A-62-70). This disposition takes on all the more significance when it is realized that it is a matter of public record that while the regular judges of the Eighth District Court of Appeals each employed two law clerks to assist them in whatever duties they assign in disposing of such cases, the judges from the visiting courts had no law clerks in their employ.

It is because of factual matters such as these that a proper disposition of this case will require detailed consideration of the record.

ARGUMENT

I.

THE DECISION OF THE CIRCUIT COURT BELOW IS CONSISTENT WITH LaVALLEE AND SUMNER

Though Petitioner would have this Court think otherwise, the narrow question before it is whether the Sixth Circuit erred in finding that this was not one of those cases in which the primary facts relied upon by the state trial court in reaching its legal conclusion could be "reconstructed" under LaVallee v. Delle Rose, 410 U.S. 690 (1973).

The relevant portion of 28 U.S.C. Section 2254(d) provides that a presumption of correctness shall normally be accorded to "a determination after a hearing on the merits of the factual issue . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia . . . ." The statute then proceeds to outline eight instances in which such a presumption shall not be accorded.

In Townsend v. Sain, 372 U.S. 293, 314-315 (1963), the precursor of Section 2254(d), it was suggested that in certain instances where a state trial court failed to make specific findings of fact, it might nevertheless be possible to reconstruct the court's determinations on matters of primary facts by considering the record before the trial court, the applicable legal standard, and the resolution of the ultimate legal issue by the trial court. Though Section 2254(d) contains no provision for such a procedure, it received approval in LaVallee v. Delle Rose, 410 U.S. 690 (1973). There the Court found, upon the record before it, that "it can scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him." 410 U.S. at 692.

However, neither Townsend nor LaVallee suggests that such a reconstruction would be possible or appropriate in all

cases.2/

Indeed such an interpretation would render the requirement of 28 U.S.C. Section 2254(d) illusory: in every habeas corpus action there will have been disputed evidence at the voluntariness hearing (otherwise there would be nothing to be litigated in the federal court) and the ultimate questions of law and fact which have been resolved against the petitioner. If the resolution of that ultimate law/fact question is said to be sufficient to assume that the subsidiary historical facts relating to credibility were resolved against the accused, then the requirements of Section 2254(d) are have no meaning. It is submitted that Congress was not engaging in subterfuge in enacting that Section of 2254. Rather, by requiring deference only to written "findings", Congress was expressly rejecting the position that the fact that an accused lost a motion to suppress was as a basis, in and of itself, for concluding that the state court properly resolved the credibility issues against the accused.

This position is reinforced by reference to the case law under this aspect of 28 U.S.C. Section 2254(d). For example, in Anderson v. Pope, 356 F. Supp. 321 (N.D. Cal. 1973), the state court conducted a hearing on the validity of a guilty plea. After the hearing the state court made the statement: "The petition is denied." Pope at 323. Under the State's view the argument would be that since the State Court Judge heard all the evidence concerning the validity of the guilty plea and since he resolved the motion against the defendant, it must necessarily follow that he decided the subsidiary factual issues against the accused. The District Court rejected this logic, indicating

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2/ The language utilized in Townsend spoke of "many situations" and the "ordinary case." 372 U.S. at 314. LaVallee placed emphasis upon the trial court's "extensive" summary of the evidence, 410 U.S. at 691, 693, and the fact that in that case there was "every indication [that the state trial court] applied the correct [legal] standards." 410 U.S. at 695.

that the requirements of subsection "d" had not been met and that the purported "finding" was not entitled to a presumption of correctness under Section 2254.

Similarly, in White v. Estelle, 556 F. 2d 1366 (5th Cir. 1977), the Fifth Circuit Court of Appeals considered the factual basis for denying another challenge to the validity of a guilty plea. In that case the State Court had not only denied a motion to set aside the guilty plea after a hearing, but had supplemented that decision by a subsequent "certificate" relating to the judge's practices in plea bargaining and guilty plea situations. Both the District Court and the Circuit Court refused to apply the presumption of correctness to the State Court's decision because:

> ". . . the requisites of Section 2254(d) were not met because there were not sufficient written findings prepared by the state court." White at 1368.

Finally, in Elliott v. Morford, 557 F. 2d 1228 (6th Cir. 1977), cert. den. 434 U.S. 1040, the court considered the effect of a decision of a state court judge denying a motion to suppress when there was conflicting testimony as to the voluntariness of a confession. Because the state Court had denied the motion, it might have been argued--as the State argues here--that the State Judge had necessarily resolved the disputed factual issues against the defendant. But the court eschewed such an approach, holding instead that:

> ". . . reliance on the presumption provided in 28 U.S.C. Section 2254(d) is misplaced . . . the trial judge made no findings of fact on the issue of voluntariness of the confession presented by the motion to suppress . . . ." Elliott at 1232.

The application of these principles to the case at bar indicates that none of the purported determinations made by the state trial court fall within the purview of Section 2254.

Thus understood, it can scarcely be disputed that even when construed most favorably to Petitioner, the interplay between Townsend, LaVallee, and Section 2254(d), results in three classes of cases: (1) those in which the state trial court has made specific findings of fact; (2) those in which such findings of fact--while absent--may be "reconstructed"; and (3) those in which the nature of the case is such as not to allow for the reconstruction of the primary facts upon which the state trial court's legal conclusions were based.

From this perspective, the judgment upon which Petitioner seeks review in this Court is an extremely narrow one. It does not, as he suggests, challenge th deference required to be paid by a state court finding under Section 2254(d), Sumner v. Mata [I], 449 U.S. 539 (1981), or Sumner v. Mata [II], ___ U.S. ___, 71 L. Ed. 2d 480 (1982). It does not challenge the procedures outlined in Sumner v. Mata [I] in order to find that one of the eight Section 2254 exceptions apply. Nor does it challenge the LaVallee view that in certain instances a Federal Court may--in the absence of express findings of fact by a state court--reconstruct the primary factual findings upon which the State court's legal conclusions were based.

Rather, the very narrow question here is whether, even under LaVallee, this is one of those cases in which such a reconstruction is proper or whether it is one in which the failure of the state court to make specific findings of fact requires an assessment of the evidence by the District Court. The majority of the Circuit Court below found that, upon the particular facts before it, this case was not appropriate for the type of "reconstruction" utilized in LaVallee.

While Respondents most assuredly submit that the decision of the majority below was correct, it must nevertheless be observed that such a decision--whether right or wrong--cannot be considered of such a nature as to justify review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

RICHARD L. AYNES
Counsel of Record

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Attorney for Respondents

CERTIFICATE OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that three copies of the foregoing Brief in Opposition were sent by first-class mail to Counsel for Petitioner(s), Simon B. Karas, 30 East Broad Street, Suite 1513, Columbus, Ohio, on this 29th day of December, 1982. The address of R.C. Marshall is P. O. Box 45699, Lucasville, Ohio 45699-0001; the address for A. R. Jago is P. O. Box 69, London, Ohio 43140-0069; the address of E. P. Perini is P. O. Box 57, Marion, Ohio 43302.

RICHARD L. AYNES
Counsel for Respondents

ORIGINAL

Case No. 82-876

RECEIVED
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,

Petitioner,

vs.

CRAIG POWLER,
CHARLES JORDAN,
and
LARRY JOHNSON,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

MOTION TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, CRAIG POWLER, CHARLES JORDAN, and LARRY JOHNSON, the Respondents, hereby request that they be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavits. All three Respondents were granted leave to proceed in forma pauperis in the United States District Court for the Northern District of Ohio and in the United States Court of Appeals for the Sixth Circuit in the course of the proceedings below.

Respectfully submitted,

RICHARD L. AYNES
Counsel of Record

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Motion and attached Affidavits to Counsel for Petitioner, Simon B. Karas, 30 East Broad Street, Suite 1513, Columbus, Ohio, on this 20th day of January, 1983. The address of R. C. Marshall is P. O. Box 45699, Lucasville, Ohio 45699-0001; the address for A. R. Jago is P. O. Box 69, London, Ohio 43140-0069; the address of E. P. Perini is P. O. Box 57, Marion, Ohio 44302.

Richard L. Aynes

RICHARD L. AYNES
Counsel for Respondents

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent, Southern Ohio Correctional Facility, Petitioner, -vs- CRAIG FOWLER, CHARLES JORDAN, and LARRY JOHNSON, Respondents.	AFFIDAVIT OF INDIGENCE

I, LARRY JOHNSON, being first duly sworn, depose and say that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? No.

   A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. May 1974 - $206. wk. $820 M.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? NO

   A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? NO

   A. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? NO

   A. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. Latina E. Germany-(Daughter)

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Larry Johnson
LARRY JOHNSON

Duly witnessed and sworn before me, a Notary Public, this 7 day of January, 1983.

John D. Morgan
NOTARY PUBLIC

JOHN D. MORGAN, Notary Public
State of Ohio
My Commission Expires October 2, 1987

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent, Southern Ohio Correctional Facility,	AFFIDAVIT OF INDIGENCE
Petitioner,	
-vs-	
CRAIG FOWLER, CHARLES JORDAN, and LARRY JOHNSON,	
Respondents.	

I, CHARLES JORDAN, being first duly sworn, depose and say that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? No.

   A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

   B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Hamilton Bed Spa $ 850.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? No

A. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? No

A. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Charles Jordan
CHARLES JORDAN

Duly witnessed and sworn before me, a Notary Public, this 6 day of January, 1983.

John D. Morgan
NOTARY PUBLIC
JOHN D. MORGAN, Notary Public
State of Ohio
My Commission Expires October 2, 1983

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,

Petitioner,

-vs- : AFFIDAVIT OF COUNSEL

CRAIG FOWLER,
CHARLES JORDAN, and
LARRY JOHNSON,

Respondents.

RICHARD L. AYNES, being first duly sworn, deposes and says that:

1. I am a member of the Bar of this Court and Counsel for Respondents Fowler, Jordan and Johnson.
2. I sent affidavits of indigence to all three respondents on the same date. While those for Mr. Jordan and Mr. Johnson were completed and returned, the affidavit of Mr. Fowler has not yet been received.
3. On Tuesday, January 18, 1983, a member of my staff contacted the Social Services Department of the London Correctional Facility where Mr. Fowler is being held and was assured that a member of their staff would speak with him and seek to expedite the return of the affidavit.
4. As soon as this affidavit is received it will be forwarded to the Clerk's Office.
5. It is my belief that Mr. Fowler is indigent. That belief is based upon the following factors:
   A. The records of the state trial court indicate that he was found indigent at the time of his trial and was represented by court-appointed counsel throughout the state proceedings;

B. The Federal District Court granted a Motion for Leave to Proceed *in forma pauperis* in the Habeas proceeding below and he was also allowed to proceed *in forma pauperis* in the Sixth Circuit;

C. He has been continuously incarcerated since the time of his arrest in 1974.

FURTHER AFFIANT SAYETH NAUGHT.

Respectfully submitted,

RICHARD L. AYNES
Counsel for Respondent
Fowler

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

SWORN TO BEFORE ME and subscribed in my presence this 20th day of January, 1983.

NOTARY PUBLIC

SHIRLEY E. JORDAN, Notary Public
Summit County, Ohio
My Commission Expires June 25, 1983

RECEIVED
JAN 28 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Case No. 82-876

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent, Southern Ohio Correctional Facility, Petitioner, -vs- CRAIG POWLER, CHARLES JORDAN, and LARRY JOHNSON, Respondents.	AFFIDAVIT OF INDIGENCE

I, CRAIG POWLER, being first duly sworn, depose and say that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

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   A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

   B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. MAY, 1974

10

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? No

A. If the answer is yes, state the total value of the items owned. N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? No

A. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

CRAIG POWELL

Duly witnessed and sworn before me, a Notary Public, this 7th day of January, 1983.

NOTARY PUBLIC

PHILIP E. VANCE
NOTARY PUBLIC-STATE OF OHIO
MY COMMISSION EXPIRES DEC. 6, 1984

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Affidavit to Counsel for Petitioner, Simon B. Karas, 30 East Broad Street, Suite 1513, Columbus, Ohio on this 24th day of January, 1983. The address of R. C. Marshall is P. O. Box 45699, Lucasville, Ohio 45699-0001; the address for A. R. Jago is P.O. Box 69, London, Ohio 43140-0069; and the address of E. P. Perini is P.O. Box 57, Marion, Ohio 43302.

RICHARD L. AYNES
Counsel for Respondent
Fowler

CASE NO. 82–876

Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,
Petitioner,

v.

CRAIG FOWLER,
CHARLES JORDAN,
LARRY JOHNSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION TO CERTIORARI

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635 F.2d 1189 (6th Cir. 1980), *vacated and remanded,* _____U.S._____, 68 L. Ed. 2d 290 (1981), *opinion after remand,* 651 F. 2d 447 (6th Cir. 1981), *cert. granted sub. nom Marshall v. Lonberger,* _____U.S._____, 71 L. Ed. 2d 292 (1982).....3,4
Mitchell v. Rose,
443 U.S. 545 (1979).....3
Sumner v. Mata, (I),
449 U.S. 539 (1981).....3,6

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Rules:

Rule 9, Rules Governing Section 2254 6

STATUS OF THE PARTIES

Petitioner concurs with the notation in respondents' answer brief that respondent Fowler is now in the custody of the London Correctional Institution and respondents Jordan and Johnson are now in the custody of the Marion Correctional Institution. The Superintendents of these facilities are respectively A.R. Jago and E.P. Perini. In order to avoid confusion, the original caption has been utilized in this reply brief.

REPLY ARGUMENT IN SUPPORT OF CERTIORARI

I. WHETHER A STATE TRIAL COURT HOLDING THAT "I FIND THE STATEMENTS WERE VOLUNTARILY GIVEN AND WERE NOT GIVEN BECAUSE OF THREATS, COERCION, AND ABUSE" IS SUFFICIENTLY PARTICULAR TO BE ACCORDED THE PRESUMPTION OF CORRECTNESS MANDATED BY PRINCIPLES OF FEDERAL–STATE COMITY AS CODIFIED IN 28 U.S.C. SECTION 2254(d) WHERE SUCH HOLDING WAS MADE AFTER A FULL AND FAIR EVIDENTIARY HEARING IN WHICH CONSIDERABLY DISPUTED TESTIMONY COULD ONLY BE RESOLVED ON THE BASIS OF A CREDIBILITY DETERMINATION; UNDER SUCH CIRCUMSTANCES MAY A FEDERAL APPEALS COURT REQUIRE A NEW FEDERAL EVIDENTIARY HEARING, EIGHT YEARS AFTER THE FACT, WHERE SUCH

EVIDENTIARY HEARING WAS NOT ONLY NOT REQUESTED IN THE DISTRICT COURT BUT STIPULATED AS BEING UNNECESSARY.

Petitioner fairly characterizes respondents' answer brief as an attempt to avoid certiorari at all costs. The only explanation for the misrepresentations and irrelevancies of that answer, which will be discussed in this reply, is a recognition that this Court could not and would not condone the appellate court's decision in this case on the merits.

Three major responses are made as to why certiorari is inappropriate. The first, as expected, is simply that this Court is too burdened with cases to deal with a clear departure from established procedent.[1] Petitioner recognizes, as all litigants must, that this Court on certiorari does not sit to correct erroneous factual applications when the correct standard is utilized. It must be comforting however to the lower courts that this Court is now too burdened to correct even a case where the proper precedential authority has not been utilized. Respondents characterize this criticism of the lower court as being an attack on the integrity of the appellate court. But one need not impute improper motives to the appellate court judges to believe that they have philosophi-

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1. Respondents, on several occasions, note the voluminous record in this case, presumably to raise the spectre that even if this Court didn't have as many cases before it as it does that this Court would have to expend extraordinary effort to review this case. While the transcript of the trial is over 8000 pages, the transcript of the motion to suppress hearing in question comprises 663 pages. Moreover, the length of the trial in this case argues for certiorari, not against it. Ohio certainly has an interest in review of a decision which overturns the finality of a conviction obtained by the expenditure of such efforts.

cally misunderstood the precedent and direction from this Court.[2] Respondents assert that this is not such a case because Judge Engel, who dissented from the opinion, did not vote for rehearing en banc. The record does not support this assertion however as the entry merely states a petition for rehearing was filed and denied and does not specify the vote of the Court. (A 60). One wonders why Judge Engel would author his cogent, lengthy, and thorough dissent, if he simply meant to accept the final result as being the proper direction for the lower appellate court to take. The bottom line is that it is somewhat incongruous that respondents, having destroyed the finality of a once thought valid conviction, should now oppose certiorari on the grounds that the criminal law system demands finality.

The second argument is that this case is somehow not important to either Ohio or the nation to warrant certiorari. Respondents point to petitioner's citation of *Lonberger v. Jago,* 635 F. 2d 1189 (6th Cir. 1980), *vacated and remanded,* _____U.S._____, 68 L. Ed. 2d 290 (1981), *opinion after remand,* 651 F. 2d 447 (6th Cir. 1981), *cert. granted sub. nom Marshall v. Lonberger,* _____U.S._____, 71 L. Ed. 2d 292 (1982), and *Clark v. Jago,* 676 F.2d 1099 (6th Cir. 1982), *cert. pending,* as well as this case, for the proposition that Ohio is merely "thrice disaffected". While it is certainly true that Ohio has been thrice disaffected, Ohio seeks to prevent being disaffected for a fourth time, etc., by establishing that the appellate court has not properly followed either *Sumner v. Mata, (I)* 449 U.S. 539 (1981) or *LaVallee v. Delle Rose,* 410 U.S. 690 (1973). That matter affects

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2. Indeed, this Court has granted certiorari and reversed where an appellate court has misapplied the controlling legal standards to the facts before it. *Mitchell v. Rose,* 443 U.S. 545 (1979). Certiorari is important in such circumstances to reemphasize what the controlling legal standards are.

all habeas corpus cases throughout the nation and petitioner's citation to these cases establishes that the dispute is fundamental. Moreover, regardless of the existence or outcome of the other cases, Ohio would still seek certiorari in this case.[3] The appellate court has established a precedent by which few, if any cases, can withstand scrutiny. As aptly stated by Judge Engel,:

> Upon the strength of the majority's opinion, if it stands, it will not hereafter be difficult to disregard the findings of state trial judges by merely pointing to some conflict in the testimony and holding that it should have been specifically resolved by written findings. We shall then be back where we were before Chief Justice Warren's admonitions of *Townsend v. Sain* were incorporated into section 2254.

(A 30) Under the appellate court's view, the presumption of 28 U.S.C. Section 2254 is a presumption without substance. While respondents suggest that Ohio's institutional need for correction of this error can be cured through the Court's response in *Lonberger, supra,* it makes no sense why these respondents should still nonetheless benefit. It again, must be comforting to know that this Court cannot correct a clear departure from precedent.

The third response is a pure historical revision of the record in this case. Respondents suggest there is no

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3. It, of course, remains to be seen whether Ohio is thrice disaffected. In *Lonberger,* this Court has granted certiorari, and the matter has been argued. *Clark* is still pending.

incongruity in their statement to the district court that no evidentiary hearing was necessary and the appellate court's remand for an evidentiary hearing.[4] Respondents hypothesize that their claim in the district court that they were entitled to a verdict based on the record subsumes a claim that they are entitled to a verdict on a new record. The only brief on the merits filed by the respondents in the district court was their motion to alter and amend judgment. Therein, the only argument respondents made was the blatantly incorrect one that the district court should make new credibility assessments from the record and reach an opposite result from the trial court. A sample follows:

> This complete reliance on state court findings conflicts with the well established principle of review as set down by the Supreme Court: . . .The Court has determined that independent review of alleged coerced confessions and involuntary statements is always required by the federal courts.[2] (footnote omitted). . .
>
> Thus, it is incumbent on this Court to review the facts independently of the state court's determination and make a de novo finding of their merit.

(Motion to Alter and Amend, page 5) (Not reproduced in appendix) The respondents' argument in the district

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4. It is true that petitioners and respondents never reached a formal stipulation that no evidentiary hearing was necessary. That suggestion, which petitioner obviously agreed with, was made sua sponte by respondents. Under the circumstances, the suggestion that there was no agreement that an evidentiary hearing was not necessary is even more incongruous.

court sounds as if *Sumner* had never been decided. As a final matter, it must be comforting to litigants, that despite clear precedent to the contrary, an appellate court will recognize and grant relief on an argument never presented to the court whose judgment is being reviewed.

In an attempt to avoid certiorari, and thus reversal, the respondents make other historical revisions of the record which must be noted. *First,* respondents suggest that the State has not been prejudiced because, despite the passage of eight years, no claim was made pursuant to Rule 9, Rules Governing Section 2254. No Rule 9 claim was made because the State was not prejudiced in responding to the petition. But the State is clearly prejudiced in responding to a new evidentiary hearing eight years after the fact after memories have faded. *Second,* respondents assert that much of the delay in this case is attributable to the State's overcharging the respondents, thus resulting in a lengthy record which delayed appellate and habeas corpus review. While charged with 33 counts and convicted of 6, the factual record establishes that the State produced evidence as to all counts charged and that with respect to a substantial number of counts that did not result in conviction the end result was not acquittal but hung jury. *Third,* the suggestion is made that the State somehow attempted to frustrate the deposit of the state trial court transcript presumably to raise the spectre that the State was attempting to hide the true facts. The record establishes that due to the size of the transcript, petitioner sought and obtained leave from the district court to file the record by depositing it with the Clerk of Courts of Cuyahoga County for safekeeping and subsequent loan basis to the district court. (Order of September 13, 1979) not reproduced in appendix). Respondents' numerous motions to transmit the record at various stages of the

proceedings stemmed from their nonunderstanding that the record, although not physically kept in the district court, was part of the record of the case. The State was and remains willing to have any Court review the record in this case and let the chips fall where they may. All the State asks is for the opportunity to show that the state court record stands on its own merits. *Fourth,* respondents note that the Sixth Circuit did not rule on their other six claims, finding the voluntariness claim dispositive. If respondents were entitled to relief on any of the other six claims, then the appellate court's treatment of this case is entirely backwards. That Court should have granted relief on the meritorious claims and left to another day this matter of national importance. *Fifth,* respondents seek to impugn the ability of the state trial judge by suggesting he improperly sentenced them. The trial judge first sentenced them each to 28 to 100 years which is the correct aggregates of the minimum and maximum sentences. The trial judge then modified such sentences to 15 to 100 years to reflect the maximum parole eligibility that each respondent faced. How this relates to his ability to determine credibility among disputed versions of events is beyond comprehension. *Sixth,* respondents suggest that somehow the appellate review of their convictions was unfair because the appellate panel was a visiting panel, presumably without knowledge of everyday police improprieties in Cuyahoga County and without the benefit of the two law clerks normally assigned to the regular appellate judges. Aside from the fact that such claims are new and outside of the record in this case, the contention is irrelevant and borders on demeaning the state appellate court judges who reviewed the case. There is no evidence to support that such judges were not competent, fair, or complete in their review of the record in this case. Moreover, visiting judges would be above any local notoriety of the case. What respondents do not do is explain in any way

why the federal appeals court could make factual findings expressly opposite to these judges, particularly with reference to the photographs of the respondents, without explaining how they reached such an opposite result.

Petitioner notes that respondents have attempted to skirt the main issue in this case. At pages 6 and 7 of the answer brief, respondents attempt to dispute the evidence relating to the crime itself and their guilt, as determined by a jury. While suggesting that they, of course, view the record with respect to the statements in a different and contrary light to petitioner, respondents nowhere attempt to directly refute the factual allegations of the petition that the trial court's finding is not only supported by the record, but that the appellate court's rewriting of that record is incorrect. In responding to certiorari, respondents simply rely on cases in which *no* finding was made by the trial court. *Elliott v. Morford,* 557 F. 2d 1228 (6th Cir. 1977), *cert. denied* 434 U.S. 1040. As this case involves a finding which has been ignored, certiorari should be granted.

CONCLUSION

Wherefore, for the above reasons, the petition for writ of certiorari should be granted and the decision of the Circuit Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief to Brief in Opposition to Certiorari has been forwarded to respondents, Craig Fowler, Charles Jordan, and Larry Johnson, through the office of their counsel, Richard L. Aynes, Appellate Review Office, College of Law, the University of Akron, Akron, Ohio 44325, via the U.S. Mail, this _____ day of January, 1983. I further certify that all persons required to be served have been so served. Respondent Fowler's address is London Correctional Institution, P.O. Box 69, London, Ohio 43140. Respondents Jordan and Johnson's address is Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302.

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